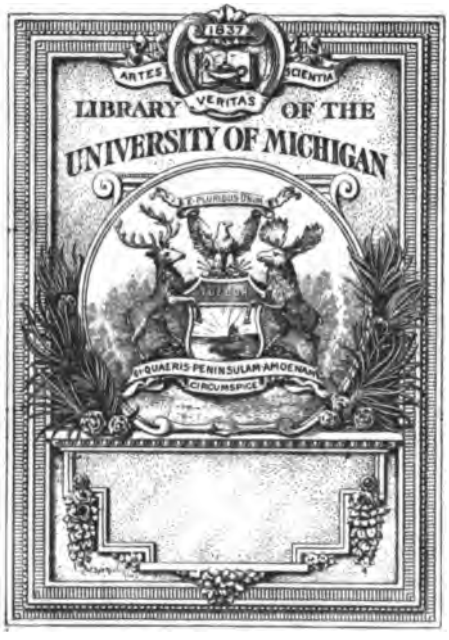
NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

1911



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PREFACE.

Some of the international law situations discussed at the Naval War College during the summer conference of 1911 are such as have arisen in connection with the work of the War College; some were proposed by officers in communications to the War College, and others have been suggested by provisions of the Declaration of London of 1909, (printed in Naval War College, International Law Topics, 1909) or by treaties to which the United States is a party. As there are many such treaties, containing provisions sometimes conflicting, with which the naval officer should be familiar, it is hoped that the treaties particularly relating to the conduct of naval warfare may soon be placed in the hands of officers in a convenient form for reference.

The discussions of the international-law situations were again conducted by Prof. George Grafton Wilson, LL. D., professor of international law at Harvard University, associé de l'Institut de Droit International, and lecturer on international law at the Naval War College for the past ten years. As a result of investigation and discussion at the Naval War College, the solutions of the situations with notes have been arranged by Dr. Wilson for record and for the information of the naval service.

Officers are invited and requested to send to the Naval War College statements of perplexing situations which may have actually confronted them or which they think are likely to arise.

R. P. RODGERS,
Rear Admiral, U. S. Navy, President.

UNITED STATES NAVAL WAR COLLEGE,
Newport, R. I., September 1, 1911.

TABLE OF CONTENTS.

International Law Situations,

WITH SOLUTIONS AND NOTES.

SITUATION I.

ASYLUM IN NEUTRAL PORT.

States X and Y are at war. The United States is neutral. Colliers belonging to and bound for fleet of State X are steaming along the coast of the United States just outside the 3-mile limit, when they sight a cruiser of State Y. The colliers immediately steam within the 3-mile limit and after 6 hours reach a United States port. The commander of the cruiser requests that the colliers be interned. The senior master of the colliers claims that he is entitled to the privileges of the 24-hour rule and that he will depart immediately, but that the cruiser must remain in port the prescribed time after his departure. With 24 hours' start the colliers can reach the fleet before they can be overtaken by the enemy cruiser.

SOLUTION.

In absence of treaty or other special regulation, the colliers of State X should be allowed to depart within 24 hours.

The cruiser of State Y should be detained 24 hours after the departure of the colliers.

NOTES.

Regulations of Institute of International Law.—The Institute of International Law at its session at The Hague

in 1898 unanimously adopted extended regulations in regard to belligerent vessels in a neutral port:

ART. 38. L'embargo mis sur des navires étrangers ancrés dans un port ne peut être justifié qu'à titre de rétorsion ou de représailles.

Il ne peut être exercé que directement au nom de l'État et par ses préposés.

On doit, autant que possible, faire connaître à ceux qui sont l'objet de cette mesure les motifs qui l'ont imposée et sa durée probable.

L'embargo doit être levé dès que la satisfaction demandée a été accordé-e. A défaut de satisfaction reçue, il peut être procédé à la vente du navire sur lequel il porte, avec attribution du prix à l'État qui l'a mis.

ART. 39. Le droit d'angarie est supprimé, soit en temps de paix, soit en temps de guerre, quant aux navires neutres.

ART. 40. Les navires de commerce qui, au début des hostilités ou lors de la déclaration de guerre, se trouvent dans un port ennemi, ne sont pas sujets à saisie, dans le délai déterminé par les autorités. Pendant ce délai, ils peuvent y décharger leur cargaison et en prendre une autre.

ART. 41. Les navires de commerce contraints par un accident de force majeure de se réfugier dans un port ennemi, ne peuvent y être capturés. Ils sont tenus, pendant leur séjour, de se conformer exactement aux prescriptions de l'autorité locale, et de reprendre la mer dans le délai qui leur aura été indiqué.

Si c'est un navire de guerre qui a été ainsi contraint de chercher un refuge dans un port ennemi, il peut être généreux de l'accueillir en lui donnant les moyens de reprendre la mer; sinon, il sera régulièrement capturé.

ART. 42. La concession d'asile aux belligérants dans les ports neutres, tout en dépendant de la décision de l'État souverain du port et ne pouvant être exigée, est présumée, à moins de notification contraire préalablement communiquée.

Toutefois, quant aux navires de guerre, elle doit être limitée aux cas de véritable détresse, par suite de: (1°) Défaite, maladie ou équipage insuffisant, (2°) péril de mer, (3°) manque des moyens d'existence ou de locomotion (eau, charbon, vivres), (4°) besoin de réparation.

Un navire belligérant se réfugiant dans un port neutre devant la poursuite de l'ennemi, ou après avoir été défait par lui, ou faute d'équipage pour tenir la mer, doit y rester jusqu'à la fin de la guerre. Il en est de même s'il y transporte des malades ou des blessés, et qu'après les avoir débarqués, il soit en état de combattre. Les malades et les blessés, tout en étant reçus et secourus,

sont, après guérison, internés également, à moins d'être reconnus impropres au service militaire.

Un refuge contre un péril de mer n'est donné aux navires de guerre des belligérants que pour la durée du danger. On ne leur fournit de l'eau, du charbon, des vivres et autres approvisionnements analogues qu'en la quantité nécessaire pour atteindre le port national le plus proche. Les réparations ne sont permises que dans la mesure nécessaire pour que le bâtiment puisse tenir la mer. Immédiatement après, le navire doit quitter le port et les eaux neutres.

Si deux navires ennemis sont prêts à sortir d'un port neutre simultanément, l'autorité locale établit, entre leurs appareillages, un intervalle suffisant de vingt-quatre heures au moins. Le droit de sortir le premier appartient au navire le premier entré, ou, s'il ne veut pas en user, à l'autre, à la charge d'en réclamer l'exercice à l'autorité locale, qui lui délivre l'autorisation si l'adversaire, dûment avisé, persiste à rester. Si, à la sortie du navire d'un belligérant, un ou plusieurs navires ennemis sont signalés, le navire sortant doit être averti et peut être réadmis dans le port pour y attendre l'entrée ou la disparition des autres. Il est défendu d'aller à la rencontre d'un navire ennemi dans le port ou les eaux neutres.

Les navires des belligérants doivent, en port neutre, se conduire pacifiquement, obéir aux ordres des autorités, s'abstenir de toutes hostilités, de toute prise de renfort et de tout recrutement militaire, de tout espionnage et de tout emploi du port comme base d'opération.

Les autorités neutres font respecter, au besoin par la force, les prescriptions de cet article.

L'État neutre peut exiger une indemnité de l'État belligérant dont il a entretenu soit des forces légalement internées, soit des malades et blessés, ou dont les navires ont, par mégarde ou par infraction à l'ordre du port, occasionné des frais ou dommage.

ART. 43. Une attaque, commencée dans la haute mer, ne peut être poursuivie dans un port ou une rade neutres où s'est réfugié un navire, sans une violation du territoire neutre, qui doit être réprimée par la puissance territoriale, au besoin par la force, et peut donner droit à une indemnité. (17 Annuaire de l'Institut de Droit International, 1898, Session de la Haye, p. 284.)

The Institute of International Law in its session at Edinburgh in 1904 reaffirmed these rules as generally recognized in cases of sojourn of warships of belligerents in neutral ports and their departure from such ports.

(20 Annuaire de l'Institut de Droit International, 1904, p. 336.)

Questions before Institute of International Law, 1910.—The question of hospitality to ships of war in neutral waters was regarded by the Institute of International Law in 1910 as one of the most important of the questions relating to maritime warfare upon which there remained such divergency of opinion as to require extended study and consideration.

The reporters of the committee of the Institute, MM. Ch. Dupuis and A. de Lapradelle, prepared a questionnaire which shows how many problems may easily arise in consequence of the unsettled condition of the relations of belligerents and neutrals in case of war upon the sea. The questionnaire in itself is suggestive:

I. Les ports neutres doivent-ils être assimilés, en ce qui concerne l'asile, au territoire neutre? Les navires de guerre belligérants qui entrent dans un port neutre doivent-ils y être retenus et désarmés, comme le sont les troupes belligérantes qui pénètrent en territoire neutre? Ou bien l'État neutre a-t-il le droit d'accueillir dans ses ports les navires belligérants pour leur permettre ensuite de reprendre la mer? Peut-il donner asile à ces navires sans limitation de nombre? Y a-t-il lieu de distinguer selon que les navires entrent au port se soustraire à la poursuite de l'ennemi ou pour toute autre cause?

II. Si l'État neutre peut admettre dans ses ports et laisser sortir les navires belligérants, est-il maître de fixer, à son gré, la durée et les conditions du séjour des navires belligérants, sans autre limitation que d'interdire la transformation de ses ports en bases d'opérations navales?

III. Doit-on admettre le principe souvent formulé en ces termes: un navire belligérant entré dans un port neutre peut en sortir plus apte à naviguer, non plus apte à combattre?

IV. Si l'État neutre peut permettre la sortie d'un navire de guerre belligérant refugié dans ses ports et s'il n'est pas libre de déterminer, à sa guise, les conditions du séjour, quelles règles est-il tenu d'observer: 1° en ce qui concerne la durée du séjour; 2° en ce qui concerne les actes à permettre ou à interdire pendant le séjour?

V. Dans quelle mesure, l'Etat neutre doit-il permettre ou interdire: 1° la réparation des avaries; 2° le ravitaillement en vivres, en combustible?

VI. Est-il tenu de limiter le ravitaillement en combustible à la quantité nécessaire pour atteindre le port national le plus

proche? Que faudrait-il alors entendre par le port national le plus proche? Y aurait-il lieu de tenir compte du sens du voyage des navires?

L'État neutre peut-il autoriser les navires de guerre belligérants à compléter leurs soutes de combustible?

VII. L'État neutre est-il tenu de fixer un laps de temps pendant lequel le navire de guerre belligérant qui se serait ravitaillé dans un de ses ports ne pourrait plus le faire de nouveau? Quel serait le délai minimum? L'interdiction pourrait-elle ne viser que le port où aurait eu lieu le primier ravitaillement, ou devrait-elle viser tous les ports de l'État, ou bien les ports qui seraient à peu de distance (et à quelle distance?) du port où aurait eu lieu le premier ravitaillement?

VIII. l'État neutre est-il tenu d'interdire: 1° la construction; 2° le départ de navires de guerre (non montés par leurs équipages) ou susceptibles d'être transformés en navires de guerre? Y a-t-il lieu de distinguer selon que l'ordre de construction serait ou non antérieur à la guerre?

IX. L'État neutre est-il tenu d'interdire aux prises l'accès de ses ports ou d'y limiter la durée de leur séjour?

X. Lorsque deux navires de guerre ennemis se trouvent dans le même port neutre, l'État neutre est-il libre de fixer, à son gré, l'ordre de leur depart? Doit-il tenir compte de la force respective des deux adversaires, de l'ordre de leur arrivée, de l'ordre de leur demande de départ?

XI. La mer territoriale doit-elle être assimilée aux ports (au territoire maritime) en ce qui concerne la présence des navires de guerre belligérants?

XII. Un État neutre est-il tenu d'interdire le passage dans ses eaux territoriales aux navires de guerre belligérants? A-t-il le droit de l'interdire en totalité ou en partie? S'il a ce droit, peut-il en user même en ce qui concerne les détroits unissant deux mers libres?

XIII. S'il n'est pas tenu d'interdire le passage, est-il tenu d'interdire le séjour dans ses eaux territoriales? Doit-il mettre obstacle au ravitaillement, dans ses eaux, par des navires de transport dont le chargement aurait été pris en dehors de ses propres ports?

XIV. Quelles responsabilités l'État neutre encourt-il s'il tolère dans ses ports ou dans ses eaux territoriales la présence, le séjour ou le ravitaillement illicite de navires de guerre belligérants? Les responsabilités sont-elles les mêmes pour les faits commis dans les eaux territoriales que pour les faits commis dans les ports? (23 Annuaire de l'Institut de Droit International (1910), p. 28.)

Some of these questions have received attention in the conferences at the Naval War College in previous years and some are involved in the situation now under consideration, a situation which was proposed in 1910, but deferred to this conference for discussion, as there was not time to devote to it in 1910.

The Institute of International Law had considered in meetings of previous years, particularly in 1906, many of the matters relating to neutrality in time of maritime war. After consideration, tentative answers were given to the questions proposed in 1910. Among these tentative rules were:

ARTICLE 1. L'État neutre est libre de fermer ou d'ouvrir ses ports aux navires de guerre de tous les États engagés dans la lutte.

Il ne doit pas modifier, au cours de la lutte, les règles qu'il a adoptées à moins que l'expérience acquise ait démontré la necessité d'un changement pour la sauvegarde de ses droits.

Il n'est pas tenu de limiter le nombre des vaisseaux admis simultanément dans ses ports, s'il a pris soin de réserver sa liberté, à cet égard, par des dispositions précises de ces lois.

Toutefois, il est tenu de désarmer et de retenir, jusqu'à la fin des hostilités, les navires de guerre qui se sont refugiés dans ses ports pour échapper à la poursuite de l'ennemi. (Ibid., pp. 96, 98.)

ART. 11. * * * Lorsque deux navires de guerre portant pavillon de deux belligérants ennemis se trouvent, en même temps, dans un port neutre, un délai de 24 heures au moins doit s'écouler entre la sortie de chacun d'eux. Le droit de sortir le premier appartient au vaisseau qui est entré le premier. Toutefois si celui-ci ne veut pas user de son droit de priorité ou s'il est évidemment plus for que l'autre, l'État neutre peut autoriser le bâtiment qui est entré le second à sortir le premier.

ART. 12. L'État neutre n'est pas tenu d'interdire le passage, dans ses eaux territoriales, aux navires de guerre belligérants et à leurs prises.

Il peut l'interdire dans les portions de ces eaux qui sont en dehors des routes maritimes nécessaires à la navigation; il doit le permettre dans les détroits qui constituent le seul moyen de passage d'une mer libre à une autre mer libre.

ART. 13. L'Etat neutre doit interdire aux navires de guerre belligérants, dans ses eaux territoriales, tout séjour qui ne serait pas motivé par la nécessité d'un ravitaillement licite en port neutre. (Ibid., pp. 96, 98.)

The two reporters of the third committee of the Institute were not, however, in agreement upon what should be the rules in regard to neutral hospitality in maritime war, and M. de Lapradelle proposed among other rules the following:

ARTICLE PREMIER. Les navires de guerre de tous les États engagés dans la lutte ont droit à l'hospitalité maritime neutre aux conditions et dans les limites qui suivent.

ART. 2. La mer territoriale et les baies, rades et ports des États neutres leur sont en principe ouverts.

ART. 3. Dans l'intérêt de sa sécurité personnelle, tout État peut, avant l'ouverture des hostilités, limiter par traités, lois et règlements, le nombre et la force des navires de guerre, de même pavillon, ou de pavillons alliés, qui seront admis simultanément dans ses ports, rades ou baies en temps de guerre.

ART. 4. Dans l'intérêt de sa securité personnelle, l'État neutre peut fermer celles de ses eaux qu'il juge nécessaire d'interdire aux navires de guerre belligérants, à condition: 1° de resserrer ainsi la navigation sans l'arrêter; 2° de déterminer les zones interdites dès le temps de paix: 3° de les fermer aux navires de commerce des belligérants.

ART. 5. Tout navire de guerre belligérant, qui, même en cas de péril de mer, pénètre dans les eaux neutres interdites, doit être aussitôt désarmé et retenu jusqu'à la fin des hostilités.

ART. 6. L'État neutre doit immédiatement désarmer et retenir, jusqu'à la fin des hostilités, le navire de guerre belligérant qui se réfugie dans ses eaux ouvertes pour échapper à la poursuite de l'ennemi.

ART. 12. Lorsqu'un navire de guerre belligérant se trouve dans un port neutre en même temps qu'un navire de commerce portant le pavillon d'un belligérant ennemi, le navire de guerre ne peut quitter le port neutre moins de 24 heures après le départ du navire de commerce.

Lorsque deux navires de guerre portant pavillon de belligérants ennemis se trouvent, en même temps, dans un port neutre, un délai de 24 heures au moins doit s'écouler entre la sortie de chacun d'eux. Le droit de sortir le premier appartient au vaisseau qui est entré le premier. (Ibid., 128.)

Opinions of publicists on territorial sea.—The question of the use of the territorial sea by belligerents has often been raised and in late years the further question as to whether the same rules should apply to the territorial waters off the coast as apply to the ports and harbors

has received attention. There has been considerable difference of opinion upon this subject.

Prof. Westlake has said:

Le droit de passage innocent dans la mer littorale d'un ami existe pour un État belligérant de même que pour un État jouissant de la paix. À l'exception de ce que dépend de ce droit, que le souverain territorial ne peut pas contester, la mer littorale doit être assimilée aux ports en ce qui concerne la présence des navires de guerre belligérants. (23 Annuaire de l'Institut de Droit International (1910), p. 136.)

Prof. Holland maintained that the territorial sea ought not to be assimilated to the ports except perhaps in case of a probability that there would be a battle which would be a peril to the coast of the neutral state.

M. Harburger said that territorial waters were, so far as concerned the obligations of belligerents, assimilated to ports—

non, eu égard à l'obligation des neutres, qui ne peuvent pas toujours savoir, ou établir s'il y a, dans leurs eaux territoriales, des navires de guerre d'un belligérant et quel en est le nombre, ou combien de temps ils s'y arrêtent. Dans la mesure où l'État neutre est renseigné sur ce point d'une façon certaine, il est lié par les obligations correspondantes. (Ibid., p. 149.)

Prof. Kauffmann maintained that in general the ships of belligerents are under the same restrictions and prohibitions in neutral territorial waters as in neutral ports and harbors.

Sojourn in neutral ports.—M. Ch. Dupuis in 1910, in making a report involving the sojourn and departure of belligerent vessels from neutral ports, said:

Mais lorsque les deux navires ennemis qui se trouvent en même temps dans un port neutre sont deux navires de guerre, l'ordre de sortie est plus délicat à régler. Diverses solutions ont été proposées. La plus rationnelle et la plus séduisante, au premier abord, accorde la priorité au bâtiment le plus faible, mais elle a le défaut d'imposer à l'État neutre un devoir d'appréciation dont l'exercice peut, en certains cas, être difficile et périlleux. D'après une seconde opinion, l'État neutre est libre de fixer, à son gré, l'ordre des départs; il échappe, ainsi, en droit, à toute responsabilité dans ses appréciations; mais s'il use de sa liberté pour décider, dans chaque cas, à sa guise, il risque d'être accusé de

partialité, et s'il en use pour déterminer, au début des hostilités, la règle qu'il s'imposera invariablement à lui-même, cette règle pourra en certain cas, donner l'avantage au navire le plus fort.

On a proposé de régler l'ordre des sorties suivant l'ordre des demandes de départ, mais ce serait inviter le bâtiment le plus puissant à formuler sa demande dès qu'entrerait au port un vaisseau plus faible portant le pavillon de l'ennemi. Enfin l'ordre des départs peut être réglé d'après l'ordre des arrivées. Le navire le plus fort peut être appelé à sortir le premier, mais en raison d'un fait absolument indépendant de la volonté de l'État neutre; la responsabilité de l'État neutre se trouve donc ainsi dégagée. (23 Annuaire de l'Institut de Droit International, p. 88.)

Other opinions were also given. Among these were:

M. Lehr:

L'État neutre doit forcer à partir, le premier, celui des deux navires dont les réparations et ravitaillement indispensables ont été terminés en premier lieu, et n'autoriser le second à sortir, à son tour, que 24 heures après le départ du premier navire. (Ibid., p. 143.)

M. Harburger:

Comme le dispose l'article 16 de la Convention XIII^me^, c'est l'époque de l'entrée au port qui doit décider de l'ordre à suivre. Mais, si l'un des deux navires est considérablement plus fort que l'autre, il faut accorder, *sans égard* à l'époque de l'arrivée, au plus faible des deux, sur sa demande, la priorité du départ, car autrement le navire le plus fort pourrait stationner dans les environs du port et guetter l'arrivée du navire le plus faible. Si le navire le plus faible était obligé, à raison de son arrivée postérieure, de prendre la mer après le navire le plus fort arrivé en premier lieu, il est à prévoir qu'on sacrifierait ainsi le navire le plus faible au navire le plus fort. Si la raison qui a déterminé l'entrée au port nécessite, de la part du navire arrivé en premier lieu un séjour plus long que de la part du navire arrivé en second lieu, l'autorisation de partir en première ligne peut être accordée à ce dernier, à moins que le différence des forces des deux navires ne milite en faveur du maintien du principe de la priorité. (Ibid., p. 148.)

M. A. Rolin:

Nous serions pour notre part fort disposé à ne pas imposer à l'État neutre de règles fixes et invariables. La raison en est qu'il est difficile de prévoir toutes les éventualités. C'est même tout au plus que nous admettrions qu'il doit s'écouler au moins 24 heures entre le départ des navires ennemis. (Ibid., p. 168.)

M. Kaufmann:

1°. Lorsque deux navires de guerre ennemis se trouvent dans le même port neutre, l'ordre des départs est déterminé par l'ordre des arrivées, à moins que le navire arrivé le premier ne soit pas dans le cas où la prolongation de la durée légale du séjour est admise, c'est-à-dire par le droit international.

2°. L'autorité ne peut intervertir l'ordre des départs si le navire de guerre qui, d'après la règle sus-mentionnée, devait partir le premier, avait une supériorité de force évidente et grande.

3°. Il doit s'écouler au moins 24 heures entre le départ d'un navire d'un belligérant et le départ du navire de l'autre. (Ibid., p. 173.)

The Hague rule on passage through neutral waters.—The Hague rule in regard to the passage of belligerent ships through neutral waters is to the effect that—

The neutrality of a power is not affected by the mere passage through its territorial waters of ships of war or of prize belonging to the belligerents. (Art. 10, Convention XIII, "Rights and Duties of Neutral Powers in case of Maritime War.")

That even this regulation was not altogether satisfactory is shown in the report which was presented by the Comité d'Examen. A part of this report forms a sort of commentary upon article 10 and should be considered with it as showing the attitude of several powers upon the use of neutral waters.

Le passage dans les eaux territoriales neutres a donné lieu à diverses difficultés.

L'Article 32 et dernier de la proposition britannique disait: "Aucune des dispositions contenues aux articles précédents ne sera interprétée de façon à prohiber le passage simple des eaux neutres en temps de guerre par un navire de guerre ou navire auxiliaire d'un belligérant." Cela pouvait s'entendre en ce sens que le neutre n'avait pas le droit d'interdire aux navires de guerre de traverser ses eaux, et il a été expliqué plus haut que, dans l'esprit de la proposition britannique, il fallait distinguer ce simple passage de l'accès ou du séjour dans les eaux territoriales.

Dans la séance du 28 juillet, le premier Délégué de Suède, à propos de l'article 30 de la proposition britanique reconnaissant à un État neutre le droit d'interdire totalement ou en partie l'accès de ses ports ou de ses eaux territoriales, avait signalé la situation spéciale concernant-les détroits qui peuvent être situés dans le rayon des eaux territoriales et suggéré l'addition d'une disposition votée par l'Institut de Droit International en 1894: "Les

détroits qui servent de passage d'une mer libre à un autre mer libre ne peuvent jamais être fermés."

Dans la séance du 30 juillet, M. Vedel, Délégué danois, a lu la déclaration suivante:

"L'amendement que la Délégation danoise s'est permis de proposer à l'article 32 du projet britannique (Vol. III, Trois. Com. Annexe 45), limite aux eaux territoriales, unissant deux mers libres, le droit du passage simple des navires de guerre et des navires auxiliaires d'un belligérant."

La Délégation danoise, en présentant cet amendement, s'est inspirée surtout des raisons suivantes: La reconnaissance d'un droit illimité de simple passage pour les navires de guerre des belligérants, ne saurait guère se concilier avec un droit, pour les neutres, de barrer, en vue de la défense de leur neutralité, des eaux intérieures, notamment celles à double entrée, qui offrent des opportunités spéciales à une flotte belligérante comme base d'opérations, ainsi que pour certaines actions illicites dans les eaux neutres. En accordant aux belligérants le droit de simple passage à travers les eaux territoriales, mais en autorisant en même temps les neutres à barrer l'entrée de ces eaux, l'on reprendrait d'une main ce qu'on aurait donné de l'autre. Comme la pose de mines sous-marines par les neutres est de la compétence d'une autre Commission, je ne puis entrer dans les détails de cette question. Je désire seulement relever la connexité des deux questions, et ensuite l'intérêt qu'il y a à ne pas restreindre par la Convention l'exercice des droits souverains du neutre sur ses eaux territoriales de manière à le priver d'un de ses moyens les plus efficaces pour maintenir des prescriptions importantes de cette même Convention.

La question avait été renvoyée au Comité d'Examen où elle a été discutée sans que des résolutions aient été arrêtées au sujet des points indiqués. De l'échange de vues qui a eu lieu, il semble résulter qu'un État neutre peut interdire même le simple passage dans des parties limitées de ses eaux territoriales, en tant que cela lui paraît nécessaire pour le maintien de sa neutralité, mais que cette interdiction ne peut s'etendre aux détroits qui unissent deux mers libres.

La formule adoptée dans l'article 10 et inspirée par un amendement de la Délégation britannique (Vol. III, Trois. Com. Annexe 56) ne tranche nullement les questions précédentes, laissées sous l'empire du droit des gens général. Elle se borne à dire que le passage dans les eaux territoriales des navires de guerre des belligèrantes ne compromet pas la neutralité de l'État, ce qui implique, à la fois, que les belligérantes ne contreviennent pas à la neutralité en passant, et que le neutre ne manque pas à ses devoirs en laissant passer.

Malgré le caractère inoffensif de la disposition, l'Amiral Sperry a déclaré ne pouvoir accepter l'article du projet, à raison des considérations politiques impliquées dans la question du passage à travers les eaux territoriales.

Dans la séance de la Sous-Commission du 30 juillet, S. Exc. Turkhan Pacha a lu la déclaration suivante:

"La Délégation ottomane croit de son devoir de déclarer qu'étant donné la situation exceptionnelle créée aux détroits des Dardanelles et du Bosphore par les traités en vigueur, ces détroits, qui sont partie intégrante du territoire, ne sauraient, en aucun cas, être visés par l'article 32 des propositions britanniques. Le Gouvernement impérial ne saurait d'aucune façon prendre un engagement quelconque tendant à limiter ses droits indiscutables sur ces détroits."

Acte a été donné de cette déclaration reproduite à plusieurs reprises et, en dernier lieu, à propos de l'article 10 qui suit.

S. Exc. M. Tsudzuki a, de son côté, déclaré que la Gouvernement japonais ne prenait aucun engagement concernant les détroits qui séparent les nombreuses îles ou îlots qui composent l'empire japonais et qui ne sont que des parties intégrantes de l'empire. (Deux. Conf. Int. de la Paix, Tome I, p. 304.)

Refuge in a neutral port.—A questionnaire of the Second Hague Conference in 1907 asked:

VII. Quelle est la condition d'un navire de guerre d'un belligérant qui se réfugie dans un port neutre pour échapper à la poursuite de son adversaire?

To this a single reply was given by Great Britain:

(15) Lorsq'un navire de guerre d'un belligérant se réfugie dans des eaux neutres afin d'échapper à la poursuite de l'ennemi, il incombe au Gouvernement de l'Etat neutre de l'interner jusqu'à la fin la guerre. (Deux. Conf. Int. de la Paix, Tome III, p. 708.)

The Brazilian delegate, Capt. Burlamaqui de Moura, maintaining that the rights and duties of neutral powers in maritime warfare were matters of much importance to Brazil, said in regard to refuge in a neutral port:

7. Lorsqu'un navire de guerre d'un belligérant se réfugie dans les ports et eaux territoriales neutres pour échapper à la poursuite de son adversaire, s'il ne peut pas effectuer les réparations nécessaires, ni s'approvisionner de manière à pouvoir reprendre le large, dans le délai qui peut lui être concédé, c'est-à-dire dans ce délai de 24 heures, il est préférable pour le garantie de l'État neutre de l'interner jusqu'à la fin de la guerre.

C'est le moyen le plus sûr de se conformer au véritable esprit de la neutralité. On ne procède pas, en ce faisant, avec trop de rigueur, car on évitera ainsi l'extrémité de fermer les ports à ces navires, ce qui pourrait entraîner pour eux de sérieux dommages, et d'autre part on évitera les complications que la difficulté de cette délicate question pourrait soulever.

On ne peut procéder ici de la même manière que dans le cas de navires en détresse par suite d'avaries provenant de l'état de la mer.

Dans ce dernier cas la solution admise par tous c'est de laisser libre de repartir le navire accueilli dans ces conditions, mais s'il n' est pas fait ainsi et si dans se cas particulier, on accorde le refuge, on commettrait une première infraction au principe de l'inviolabilité des ports et des eaux neutres, infraction qui naturellement sera considérée comme complète si l'on n'exige pas la sortie subséquente du navire belligérant, après le délai habituel de 24 heures de son séjour dans ces ports ou dans ces eaux.

Une considération d'humanité doit déterminer sans doute les neutres à recevoir un navire belligérant poursuivi; ce secours étant indispensable pour qu'il échappe à un danger qui peut compromettre gravement la situation de ceux qui se trouvent à son bord ou qui peut l'exposer à une perte certaine s'il ne se réfugie pas dans le premier port qui se présente à lui.

Mais une fois que ce devoir est accompli, qu'on a laissé de côté les règles établies sur ce sujet pour ne plus faire place qu'aux sentiments chrétiens, qui commandent non seulement qu'on accueille le navire, mais même qu'on aille à son secours, pour le sauver, on admet aujourd'hui pour faciliter au neutre le maintien de sa neutralité que ces navires devront être retenus dans les ports et les eaux neutres, y être désarmés et qu'ils ne pourront reprendre aucune part aux hostilités pendant la durée de la guerre. (Deux. Conf. de la Paix, Tome III, p. 582.)

Refuge under Brazilian treaty.—The treaty of 1828 with Brazil would be binding in case one of the parties to the war was not also a party to the Hague convention. Article 8 provides:

Whenever the citizens or subjects of either of the contracting parties shall be forced to seek refuge or asylum in the rivers, bays, ports or dominions of the other, with their vessels, whether of merchant or of war, public or private, through stress of weather, pursuit of pirates or enemies, they shall be received and treated with humanity, giving to them all favor and protection, for repairing their ships, procuring provisions, and placing themselves in a situation to continue their voyage without obstacle or hindrance of any kind. (Treaties and Conventions, 1776–1909, vol. 1, p. 136.)

This article makes special provision for asylum for vessels of war pursued by enemies until they can place "themselves in a situation to continue their voyage without obstacle or hindrance of any kind." A strict interpretation of such an article would nullify the doctrine of internment.

Brazilian neutrality proclamation, 1898.—Article 8 of the treaty of 1828 does not seem to accord with the clauses of the Brazilian neutrality proclamation issued during the Spanish-American War of 1898.

VI. No warship or privateer shall be permitted to enter and remain, with prizes, in our ports or bays during more than 24 hours, except in case of a forced putting into port, and in no manner shall it be permitted to it to dispose of its prizes or of articles coming out of them.

By the words "except in case of a forced putting into port" should also be understood that a ship shall not be required to leave port within the said time:

First. If it shall not have been able to make the preparations indispensable to enable it to go to sea without risk of being lost.

Second. If there should be the same risk on account of bad weather.

Third. And, finally, if it should be menaced by an enemy.

In these cases, it shall be for the Government, at its discretion, to determine, in view of the circumstances, the time within which the ship should leave.

VII. Privateers, although they do not conduct prizes, shall not be admitted to the ports of the Republic for more than 24 hours, except in the cases indicated in the preceding section.

VIII. No ship with the flag of one of the belligerents, employed in the war, or destined for the same, may be provisioned, equipped, or armed in the ports of the Republic, the furnishing of victuals and naval stores which it may absolutely need and the things indispensable for the continuation of its voyage not being included in this prohibition.

IX. The last provision of the preceding section presupposes that the ship is bound for a certain port, and that it is only en route and puts into a port of the Republic through stress of circumstances. This, moreover, will not be considered as verified if the same ship tries the same port repeated times, or after having been relieved in one port should subsequently enter another, under the same pretext, except in proven cases of compelling circumstances. Therefore, repeated visits without a sufficiently justified motive would authorize the suspicion that the ship is not really en route, but is frequenting the seas near Brazil in order to make

prizes of hostile ships. In such cases, asylum or succor given to a ship would be characterized as assistance or favor given against the other belligerent, being thus a breach of neutrality.

Therefore, a ship which shall once have entered one of our ports shall not be received in that or another shortly after having left the first, in order to take victuals, naval stores, or make repairs, except in a duly proved case of compelling circumstances, unless after a reasonable interval which would make it seem probable that the ship had left the coast of Brazil and had returned after having finished the voyage she was undertaking.

X. The movements of the belligerent will be under the supervision of the customs authorities from the time of entrance until that of departure, for the purpose of verifying the proper character of the things put on board.

* * * * *

XV. The ships of either of the belligerents, however, which may be admitted to anchorage or harbor in the Republic, must remain in perfect quiet and complete peace with all the ships which may be there, especially those of war or armed for war, belonging to the hostile power.

The Brazilian forts and war ships will be ordered to fire upon a ship which shall attack its enemy within Brazilian harbors or territorial waters.

XVI. No ship shall be allowed to leave port immediately after a ship belonging to a hostile nation or a neutral nation.

If the vessel leaving, as well as that left behind, be a steamer, or both be sailing vessels, there shall remain the interval of 24 hours between the sailing of one and the other. If the one leaving be a sailing vessel and that remaining a steamer, the latter may only leave 72 hours thereafter.

Brazilian forts and warships shall fire upon any armed vessel which may be preparing to leave before the expiration of the indicated interval, after the departure of a ship belonging to the other belligerent.

* * * * *

XVIII. Belligerent warships which shall not wish to have their departure impeded by the successive leaving of merchant vessels or hostile war ships should communicate, 24 hours in advance, to one of the officials indicated in the preceding section and who shall be the authorized person on the occasion, an application for leaving. Priority of sailing will be determined by the receipt of advice.

XIX. Warships may not leave port unless the merchant vessels of the other belligerent which may be at the bar or have been announced by telegraph or other means first enter, except the respective commanders give their word of honor to the commandant of the naval station, and, in default of him, to the

authorized official, that they will do no harm to them; and if, besides this, they shall not be prevented. (U. S. Foreign Relations, 1898, p. 847.)

Questionnaire of the Hague Conference, 1907.—The questionnaire before the Hague Conference in 1907 asked whether the duration of the sojourn of ships of war of belligerents in the ports and waters of neutrals should be limited. The replies of Spain, Great Britain, Japan, and Russia received particular consideration and were as follows:

Spain:

ART. 3. Les vaisseaux belligérants ne pourront séjourner plus de 24 heures dans les ports ou les eaux neutres, sauf par cause d'avarie, état de la mer ou autre force majeure.

Great Britain:

(11) Une Puissance neutre devra notifier à tout navire de guerre d'une Puissance belligérante—stationnant à sa connaissance dans ses ports ou eaux territoriales au moment de l'ouverture des hostilités—qu'il ait à partir dans les 24 heures.

(12) Une Puissance neutre ne devra pas sciemment permettre à un navire belligérant de demeurer dans ses ports ou eaux territoriales pour une période de plus de 24 heures, sauf dans les cas prévus aux articles de la présente Convention.

Japan:

(2) Les navires belligérants ne pourront entrer ni séjourner dans les ports ou eaux neutres plus de 24 heures, sauf dans les cas suivants:

(*a*) Dans le cas où l'état de la mer empêcherait lesdits navires de reprendre le large, la durée de séjour légale sera étendue jusqu'à ce que cet état de la mer cesse d'être un danger.

(*b*) L'intervalle de ni plus ni moins de 24 heures doit être maintenu entre le départ d'un port ou des eaux neutres d'un bâtiment de commerce ou d'un bâtiment de guerre d'un belligérant, et le départ des mêmes ports ou eaux neutres d'un bâtiment de guerre de l'autre belligérant. C'est à l'État neutre de décider lequel des bâtiments adversaires partira le premier.

Russia:

(4) Il appartient à l'État neutre de fixer le délai de séjour à accorder aux bâtiments de guerre des États belligérants dans les ports et les eaux territoriales appartenant à cet État neutre. (Deux. Conf. Int. de la Paix, Tome III, p. 706.)

Great Britain maintained at the Second Hague Conference in 1907, that when a ship of war of a belligerent

sought refuge in neutral waters in order to escape pursuit of its enemy, it was the duty of the Government of the neutral State to intern the refugee till the end of the war. (Deux. Conf. Int. de la Paix, Tome III, p. 696.) This seems also to be covered in the instruction to the British delegates, as shown in Sir Edward Grey's letter of June 12, 1907.

33. The subject of the treatment of interned belligerent vessels appears to be included in the Russian program under the heading. "Régime auquel seraient soumis les bâtiments des belligérants dans les ports neutres." His Majesty's Government hold that while the warship of a belligerent taking refuge in a neutral port must, failing her departure within 24 hours, be interned, the question of her ultimate disposal is one which it would be best to leave to be dealt with under the terms of the treaty of peace. You will no doubt remember that one of the conditions of peace put forward by the Japanese plenipotentiaries at the negotiations at Portsmouth, United States of America, but afterwards abandoned, was the surrender to Japan of the Russian warships which had taken refuge at Kaio-chau, Shanghae, and Saigon, and which had there been interned. (Second Peace Conference at The Hague, 1907; Parliamentary Papers, Miscellaneous, No. 1, 1907, p. 17.)

In the Convention concerning the Rights and Duties of Neutral Powers in Naval War, ratified by the United States April 17, 1908, and generally approved by the States parties to the Second Hague Conference, there are several articles referring to the use of neutral waters by belligerents.

ART. XVIII. Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

ART. XIX. Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral power, the ships are not supplied with coal within 24 hours of their arrival, the permissible duration of their stay is extended by 24 hours.

ART. XX. Belligerent warships which have shipped fuel in a port belonging to a neutral power may not within the succeeding three months replenish their supply in a port of the same power.

Discussion of passage through neutral waters.—Great Britain, in presenting a somewhat elaborate scheme in regard to the regulation of rights and duties of neutrals in maritime war, proposed—

ART. 32. Aucune des dispositions contenues aux articles précédents ne sera interprétée de façon à prohiber le passage simple des eaux neutres en temps de guerre par un navire de guerre ou navire auxiliaire d'un belligérant. (Deux, Conf. Int. de la Paix, Tome III, p. 699.)

Of the general scheme Sir Ernest Satow said:

Mon Gouvernement a cru de son devoir de proposer à la Conférence le règlement dont le projet a été déposé en son nom, parce qu'il considère qu'il est de la plus haute importance de définir d'une façon précise le traitement qu'un Etat neutre pourra accorder à des vaisseaux de guerre belligérants dans ses ports et eaux territoriales. On doit aux neutres de leur indiquer les limites dans lesquelles il leur sera permis en temps de guerre d'arbiter et d'approvisionner des navires d'un des belligérants, sans qu'ils s'exposent par là à des plaintes justifiées de la part de l'autre belligérant. De même, il n'est que juste de préciser le traitement auquel les belligérants auront le droit de s'attendre de la part des neutres. Toute incertitude à cet égard ne peut donner lieu qu'à des malentendus et à des disputes. Or il est incontestable que l'incertitude règne en cette matière. Nous n'avons qu'à consulter les textes pour nous en convaincre. Ainsi, pour prendre un exemple, il est déclaré dans plusieurs ouvrages de droit international que la règle dite des 24 heures est universellement reconnue, tandis que nous savons que plusieurs États ne reconnaissent pas cette règle et ne se croient pas tenus de l'observer. (Ibid., p. 571.)

After discussion of article 32 of the British proposition, the form changed to:

Un État neutre ne peut interdire le simple passage dans ses eaux territoriales aux vaisseaux de guerre des belligérants. (Ibid., p. 718.)

Later the form was made:

La neutralité d'un Etat n'est pas compromise par le simple passage dans ses eaux territoriales des navires de guerre et des prises des belligérants. (Ibid., p. 725.)

In its final form as Article X of the Convention concerning the Rights and Duties of Neutral Powers in case of Maritime War the same form was followed, except that the word "puissance" was substituted for the word "État."

M. Hagerup, a member of the permanent court at The Hague, in 1910, said of the work of the Hague Conference as regards neutral and belligerent rights and duties in maritime war:

La convention de La Haye constitue un grand progrès pour les petits États neutres et cela à un triple point de vue:

1°. Elle a mis en evant, non pas les devoirs des neutres, mais les devoirs des belligérants.

2°. Elle a mis les devoirs des neutres en rapport avec leurs moyens.

3°. Elle a établi la distinction entre les eaux territoriales et les ports. (23 Annuaire de l'Institut de Droit International, 1910, p. 402.)

Military forces and foreign jurisdiction.—As a general principle the exercise of military force is confined to the area within which the State to which the force belongs has authority and to the territory of its enemies. The entrance of a foreign armed force upon the land of a foreign State is usually prohibited even in the time of peace, and the rule is that if such force of a belligerent enters neutral territory it shall be interned. The Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land provided:

ART. XI. A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

Naval forces are, however, received within the territorial waters of a State freely in time of peace and under certain restrictions in time of war. In time of war a neutral State must preserve its neutrality, though war vessels of one or of both the belligerents may come into its ports or waters. The war vessel naturally desires freedom of action and the neutral must be able to justify its action in granting a degree of freedom. The amount of freedom and extent of privileges which the neutral

might grant to one belligerent without risk of claims for indemnity by the other belligerent is not always easy to determine. Proclamations of neutrality have often set forth the limitations which the neutral State would impose upon the action of belligerents. While these limitations might be impartially applied to both of the belligerents, one belligerent might in fact profit much more than the other in the enforcement of the limitations. If the spirit of the proclamation of neutrality is such as to embody the general principles commonly recognized as just, no objection may be raised on the ground that one State may by the accident of proximity, nature of its resources, or from other such cause be relatively more benefited than the other State. It is not always possible to determine how far a given proclamation may work favorably as regards one belligerent and unfavorably as regards another. The Hague Conferences of 1899 and 1907 and other gatherings of those interested in international questions have tried to mark the line of proper conduct of belligerents within neutral jurisdiction and obligations of neutrals as regards those who come within their jurisdiction.

In time of war the relations of belligerents and neutrals are changed and some acts which might be freely permitted by a neutral in time of peace must be prevented or regulated.

In considering the reconciliation of the rights of neutrals and belligerents at the Second Hague Conference in 1907 Count Tornielli, President of the Third Commission, said:

> Ces préceptes peuvent être ainsi formulés:
>
> 1°. Reconnaissance réciproque entre les puissances contractantes de leur indépendance législative en matière de respect de la neutralité;
>
> 2°. Application impartiale à toutes les parties belligérantes de la législation que chaque État se sera donnée;
>
> 3°. Renonciation réciproque par les neutres d'introduire dans leurs législations nationales concernant cette matière des variations pendant que l'état de guerre existe entre deux ou plusieurs puissances contractantes;
>
> 4°. Devoir absolu des belligérants de respecter les lois des neutres. (Deux. Conf. Int. de la Paix, Tome III, p. 570.)

The Hague rule as to internment.—The rule adopted at The Hague in 1907 was as follows:

ART. 24. If, notwithstanding the notification of the neutral power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission. (Convention concerning rights and duties of neutral powers in case of maritime war.)

This rule is not aimed at a vessel which voluntarily leaves the neutral port without notification and before the time limit allowed for departure has expired.

The Hague Convention XIII binds United States.—The United States has adhered to and proclaimed the Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Maritime War. Its provisions would therefore be binding upon the United States in time of a war in which the States concerned were also parties to the Convention.

ART. 28. The provisions of the present convention do not apply except between the contracting powers, and only if all the belligerents are parties to the convention.

Prof. Westlake's opinion.—Prof. Westlake speaking of the rule permitting to a belligerent vessel of a sojourn of 24 hours in a neutral port says:

The first remark on this is that no distinction is made in it between the cases of a belligerent ship of war entering neutral waters in flight from an enemy to escape from peril of the sea or for any reason lying within her free choice. Yet these cases may be distinguished in principle. When refuge is given even for a limited time to a ship of war flying from an enemy, in which must be included the case of escape after defeat although no pursuer may be following close, we have not to do with that aid

of a merely general nature which can not fail to be received from any use of a neutral port, but with the interruption of a specific operation of war to the advantage of the belligerent who is received but not interned. Accordingly the Institute of International Law has justly laid down that "a belligerent ship taking refuge in a neutral port from pursuit, or after being defeated by the enemy, or for want of a sufficient crew to keep the sea, must remain there till the end of the war." The same applies if she conveys there any sick or wounded, and is in a condition for fighting when she has landed them. The sick or wounded, although received and succored, must equally be interned after being healed unless judged to be unfit for military service. The want of a sufficient crew to keep the sea is here put on a level with flight from the enemy, because to permit the recruitment of men would be a more obvious and flagrant breach of neutrality than to permit the receipt of supplies and repairs. In comparing the rule of the Institute with the British rule it must be borne in mind that the latter only limits the stay of a belligerent ship of war, not recognizing or conferring on her a right even to the hospitality so limited, and that an intention can not be presumed to surrender or fetter the power of the Crown to deal with any case as the principles of neutral duty may require. The British rule is not, therefore, to be read as insuring a 24-hour stay, free from internment, to a ship of war flying from her enemy or wanting a sufficient crew to keep the sea, and we can not believe that such would be granted to her. (Westlake, International Law, Part II, War, p. 209.)

Departure of belligerent vessels simultaneously in neutral port.—The question of the order of departure of vessels of opposing belligerent parties when such vessels are at the same time in a neutral port has often given rise to difficulties. Some of these difficulties and the regulations of several States in regard to the sojourn and departure of belligerent vessels from neutral ports are set forth in the notes on Situation II of the Naval War College, International Law Situations of 1908 (pp. 37–52). The question under consideration in 1908 is, however, different from the present situation which relates to permitted departure while the situation of 1908 related particularly to the case of a return to port to escape the enemy. The rules in regard to the departure from neutral ports of the war ships of opposing belligerents have been of slow growth.

At the Second Hague Conference in 1907 a questionnaire asked:

VIII. Comment faut-il regler le cas de navires des deux parties belligérantes se trouvant simultanément dans un port neutre? Fixation de l'ordre des départs.

The replies to this question were as follows:

Great Britain:

(13) Si des navires, soit de guerre soit de commerce, des deux Parties belligérantes se trouvent au même moment dans le même port ou la même rade d'un neutre, le Gouvernement neutre ne devra pas permettre à un vaisseau de guerre d'un des belligérants de quitter le port ou la rade sauf à l'expiration d'un délai de 24 heures après le départ d'un navire, tant de guerre que la commerce, de l'autre belligérant.

Japan:

(2*b*) L'intervalle de ni plus ni moins de 24 heures doit être maintenu entre le départ d'un port ou des eaux neutres d'un bâtiment de commerce ou d'un bâtiment de guerre d'un belligérant, et le départ des mêmes ports ou eaux neutres d'un bâtiment de guerre de l'autre belligérant. C'est à l'État neutre de décider lequel des bâtiments adversaires partira le premier.

Russia:

(6) Lorsque des bâtiments de guerre et de commerce des deux parties belligérantes se trouveront simultanément dans un port neutre, il y aura un intervalle de vingt-quatre heures entre le départ subséquent des bâtiments de l'autre belligérant.

De la priorité de la demande faite par les navires de l'un des États belligérants peuvent librement profiter les autres navires du même belligérant se trouvant dans le même port. (Deux. Conf. de la Paix, Tome III, p. 708.)

After much discussion the Hague Conference adopted in the Convention concerning the Rights and Duties of Neutral Powers in Maritime War, the rule that:

ART. 12. In the absence of special provisions to the contrary in the legislation of the neutral power, belligerent ships of war are forbidden to remain in the ports, roadsteads, or territorial waters of the said power for more than 24 hours, except in cases covered by the present convention.

Germany ratified this Convention with reserve on this article 12. Several of the more important naval powers had not ratified the Convention up to July, 1910.

It was interpreted in the Conference that the sense of article 12 was—

S'il n'y a pas de loi spéciale édictée par l'État neutre, c'est la loi des 24 heures qui est la règle; il est naturellement loisible à l'État neutre d'établir un autre délai. Mais, la rédaction de l'article rend obligatoire pour les États qui ne veulent pas de la règle de 24 heures, l'établissement d'une autre règle spéciale. (Deux. Conf. Int. de la Paix, Tome III, p. 627.)

The discussion upon the order of departure of belligerent vessels from neutral ports brought out differing opinions. These are briefly summarized in the report of the Third Commission as follows:

Il y avait donc en présence les systèmes suivants; 1. l'État neutre règle l'ordre des départs; 2. la priorité des demandes est prise en considération; 3. le navire le plus faible part le premier; 4. l'ordre des arrivées détermine l'ordre des départs.

Ce dernier système a fini par être admis, et l'article 16 ci-après a été voté par 13 voix (Allemagne, États-Unis d'Amérique, Belgique, Brésil, Chine, Danemark, Espagne, France, Italie, Norvège, Russie, Suède, Turquie), contre 3 (Grande-Bretagne, Japon, Portugal); les Pays-Bas se sont abstenus.

On a trouvé dangereuse pour l'Etat neutre la faculté de fixer l'ordre des départs même en lui donnant quelques indications. Si très souvent l'inégalité entre deux vaisseaux de guerre est évidente, il peut n'en être pas ainsi et l'autorité du port pourrait être embarrassée. La règle de l'ordre des arrivées est très simple et le neutre n'aura aucune difficulté à l'appliquer. Elle pourra se trouver forcément modifiée si le navire entrant le premier est dans un cas où la durée légale du séjour est prolongée à son profit; il ne peut être privé de cette prolongation par l'effet de l'obligation de partir le premier. La règle des 24 heures est maintenue dans les rapports d'un bâtiment de guerre et d'un bâtiment de commerce en ce sens que le premier ne peut quitter un port moins de 24 heures après le départ du second, mais la réciproque n'est pas vraie. Rien n'empêche un bâtiment de commerce portant le pavillon d'un belligérant de quitter, si cela lui convient, un port moins de 24 heures après un navire de guerre de l'autre belligérant.

Il n'y a pas non plus de délai de 24 heures entre les départs de deux navires de commerce.

On avait pensé pouvoir écarter la difficulté résultant de la présence simultanée dans un port de deux navires de forces inégales au moyen de la disposition suivante: "Si un navire de guerre belligérant se dispose à entrer dans un port ou dans une rade neutre où se trouve un navire de guerre de son adversaire,

l'autorité locale doit, autant que possible, l'avertir de la présence du navire adverse." (Vol. III, Trois Com. Annexe 53.) Le navaire ainsi averti aurait vu ce qu'il avait à faire; s'il se sentait plus faible que son adversaire, il pouvait ne pas entrer ou, s'il entrait, il savait qu'il ne pourrait sortir qu'après lui. La proposition a fini par être rejetée par 8 voix (Allemagne, Etats-Unis d'Amérique, Chine, Espagne, Grande-Bretagne, Japon, Portugal, Suède) contre 5 (Belgique, Brésil, Danemark, France, Italie) et 4 abstentions (Norvège, Pays-Bas, Russie, Turquie), parce qu'on a considéré qu'une disposition de ce genre engagerait trop la responsabilité du neutre. (Deux. Conf. Int. de la Paix, Tome I, p. 313.)

Article 16 of the Convention concerning the Rights and Duties of Neutral Powers in Maritime War adopted after much discussion made provision for the order of departure of ships of war from neutral ports.

When ships of war of both belligerents are present simultaneously in the same port or roadstead, a period of not less than 24 hours must elapse between the departure of a ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of the period allowed legally is admissible.

A belligerent ship of war can not leave a neutral port or roadstead less than 24 hours after the departure of a merchant ship flying the flag of its adversary.

Two views.—The treatment of a vessel of war which has entered a neutral port when pursued by an enemy is still a matter for difference of opinion.

One group maintain that, when a ship of war enters a neutral port for a reason which would prompt her to enter even if no war existed, the ship should be granted the fullest hospitality of the port. Thus a ship of war would be received without question when entering because of stress of weather, want of fuel or supplies, need of repairs, provided fuel or supplies were not with the direct purpose of attacking the enemy and repairs were of damages caused by other agencies than the enemy. This group would not limit the stay of a ship of war in a neutral port provided such stay were not directly a part of a military operation. M. de Lapradelle says:

Le traitement du navire de commerce, instrument de la navigation sans combat, s'étend au navire de guerre en tout ce que

l'un et l'autre ont de commun, et s'arrête à tout ce que la navire de guerre a de spécial. (23 Annuaire de l'Institut de Droit International, p. 121.)

It follows from such a position as this that there would be no limitation on the sojourn of a ship of war other than upon a merchant vessel unless the sojourn was a step in the conduct of a hostile operation. The entrance to a neutral port to escape a pursuing enemy would be directly related to the military operations and should not be allowed under any conditions other than that of internment of the vessel till the end of the war.

Another group, including lawyers, writers, and naval and other administrative officials, favor the grant of a 24-hour sojourn for any ship of war that may enter a neutral port. They maintain that a neutral can not investigate the cause of entrance of each vessel, and sometimes could not learn, even by investigation; that a mistake by the neutral as to the cause of entry might have a serious bearing on the issue of the war; that what might seem a military reason to one might not to another State; that the complications introduced by inquiry as to the reason for entrance would be too burdensome upon the neutral, and that a definite rule should be established. These favor the 24-hour rule that has been widely accepted, contending that if the pursued vessel has a position which is so advantageous that it allows her to enter a neutral port she is entitled to the benefits of such entrance, and that if the pursuer wishes to overcome this advantage he should wait outside the neutral jurisdiction for 24 hours and then demand the internment of the pursued vessel if she does not come out.

Résumé.—The weight of opinion, as shown in discussions and conventional agreements, seems to be in favor of allowing the 24-hour sojourn to vessels of war without obliging the neutral to investigate the cause of entrance. Practice has been to allow such sojourn. The modern tendency is to free the neutral so far as possible from the burdens of the war. The 24-hour rule of sojourn is well understood and avoids arbitrary decisions which might involve controversy. It might occur that a neutral

would not regard a vessel as pursued which was in fact pursued. On the other hand, a neutral might consider a vessel as pursued which was not in fact pursued and a neutral might by internment deprive a belligerent desiring to make a capture of the opportunity.

The present law and practice is to allow the 24-hour rule to operate in absence of special regulation to the contrary, as is stated in article 12 of the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War:

> In absence of special provisions to the contrary in the legislation of a neutral power, belligerent war ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than 24 hours, except in the cases covered by the present convention.

Application to Situation I.—When States X and Y are at war and the United States is neutral, colliers belonging to and bound for the fleet of X do not commit any offense against the United States by steaming within the 3-mile limit of the United States, as by the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War, article 10:

> The neutrality of a Power is not affected by the mere passage through its territorial waters of war ships or prizes belonging to belligerents.

The entrance to the port from which the 24-hours' sojourn is reckoned is not from the time of passing within the 3-mile limit, for in some waters it might at an unfavorable tide, or if the vessel were disabled, take the entire period to bring the vessel into the harbor. The 24-hour period for the colliers of State X would, therefore, be reckoned from the time of entrance of the port and the colliers would be entitled under ordinary circumstances to remain 24 hours from that time.

The request of the commander of the cruiser that the colliers be interned would be a legitimate one if the colliers remained more than 24 hours, unless there were extraordinary reasons why a prolongation of sojourn should be allowed.

In this situation, however, the master of the colliers indicates his willingness to depart immediately, and, as he is the earlier arrival of two belligerents, he is entitled to precedence in departure.

This claim that the cruiser must remain the prescribed time after his departure is in accord with regulations and practice.

ART. 16. When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than 24 hours must elapse between the departure of the ship belonging to one belligerent and the ship belonging to the other. (Hague convention, Rights and duties of neutral powers in naval war.)

The fact that the colliers can reach the fleet of X before the cruiser of Y can overtake them if allowed this 24-hour start is not a matter with which the United States has concern. If the commander of the cruiser did not wish to come under the laws regulating sojourn in neutral ports, he should not enter a neutral port. There is no law that prevented him from cruising outside the 3-mile limit and awaiting the coming of the colliers.

SOLUTION.

In absence of treaty provision or other special regulation, the colliers of State X should be allowed to depart within 24 hours.

The cruiser of State Y should be detained 24 hours after the departure of the colliers.

SITUATION II.

PROTECTION TO NEUTRAL VESSELS.

There is war between States X and Y. The United States and Germany are neutral. A United States cruiser is convoying six United States merchant vessels and when 100 miles at sea is overtaken by two German merchant vessels having papers from a Prussian port. The German vessels are going on the same course and request the protection of the convoy, offering to give the same evidence of their neutral character as that offered by the United States merchant vessels. Shortly afterwards a cruiser of State X approaches and claims that she has the right to visit and search the German vessels forthwith, while the German masters claim the protection of the United States cruiser.

How should the captain of the United States cruiser act?

SOLUTION.

The captain of the United States cruiser should, in accord with special treaty provision and Navy Regulations afford to the German vessels "protection and convoy, so far as it is within his power."

NOTES.

Historical.—The question of right of convoy became a matter of controversy in 1653, when Sweden asserted the right of its merchant vessels to exemption from search if sailing under the escort of a vessel of war. Great Britain generally opposed this contention, and in the Admiralty Manual of Prize Law of 1888 said:

> No vessel is exempt from the exercise of these powers (visit and search) on the ground that she is under the convoy of a neutral public ship.

From 1653 the continental States gradually came to favor the doctrine of convoy.

The acceptance by a neutral vessel of convoy of a belligerent vessel has been regularly held by the American and British courts as equivalent to resistance to visit and search, and that such a neutral vessel is liable to the consequences. The Armed Neutrality League of 1780 and 1800 emphasized the demand of neutral commerce for protection. The resort to paper blockades and other arbitrary methods during this period and the early years of the nineteenth century prompted the negotiation of liberal treaties among the neutral States. Russia, Sweden, Denmark, and Prussia, in 1800, agreed by the terms of the league:

> Que la déclaration de l'officier, commandant le vaisseau ou les vaisseaux de la Marine Royale ou Impériale, qui accompagneront le convoi d'un ou de plusieurs bâtiments marchands, que son convoi n'a à bord aucune marchandise de contrebande, doit suffire pour qu'il n'y ait lieu a aucune visite sur son bord ni à celui des bâtiments de son convoi.

The British position was uniformly against the acknowledgment of the right of convoy, though early in the nineteenth century some modifications of the previous British contentions were made. The rules of the continental States usually provide that the declaration of a convoying officer shall be accepted.

Spanish-American War, 1898.—In the Spanish-American War of 1898 the Spanish war decree provides:

> Merchant vessels sailing under convoy, under charge of one or more ships of the navy of their nation, are absolutely exempt from the visit of the belligerents, being protected by the immunity enjoyed by the warships.
>
> As the formation of a convoy is a measure emanating from the Government of the State to which belong the vessels protecting the convoy, as well as the vessels under convoy, it must be taken as certain that the Government in question not only will not allow fraud of any kind but has employed the strictest measures to avoid fraud being committed by any of the vessels under the convoy.
>
> It is therefore useless for the belligerent to inquire of the chief officer of the convoy whether he guarantees the neutrality of the ships sailing under his charge, or of the cargo they carry. (U. S. Foreign Relations, 1898, p. 778.)

Japanese Regulations, 1904.—Article XXXIII of the Japanese Regulations Governing Captures at Sea, 1904, is:

A neutral vessel under convoy of a war vessel of her country shall not be visited or searched if the commanding officer of the convoying war vessel presents a declaration signed by himself stating that there is on board the vessel no person, document, or goods that are contraband of war, and that all the ship's papers are perfect, and stating also the last port which the vessel left and her destination. In case of grave suspicion, however, this rule does not apply.

Russian Regulations, 1904.—Russia in 1904 republished the Prize Regulations of March 27, 1895, which provided that—

Merchant vessels sailing under military convoy of an allied or neutral power are not subjected to examination, provided the commander of the convoy furnishes a certificate as to the number of vessels being convoyed, their nationality, and the destination of the cargoes, and also as to the fact that there is no contraband of war on the vessels. The stoppage and examination of these vessels is permitted only in the following cases: (1) When the commander of the convoy refuses to give the certificate mentioned; (2) when he declares that one or another vessel does not belong to the number of those sailing under his convoy; and (3) when it becomes evident that a vessel being convoyed is preparing to commit an act constituting a breach of neutrality. (U. S. Foreign Relations, 1904, p. 736.)

The right of convoy of merchant vessels of a neutral by warships of the same flag was generally recognized in practice at the end of the nineteenth century, though Great Britain in theory opposed.

Treaty provisions as to visit.—There are several treaties to which the United States is a party which contain provisions in regard to the visit of vessels under convoy somewhat similar to or exactly identical with the following Brazilian treaty of 1828:

ART. 22. It is further agreed that the stipulations above expressed relative to the visiting and examining of vessels shall apply only to those which sail without convoy; and when said vessel shall be under convoy the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries,

and when they are bound to an enemy's port that they have no contraband goods on board shall be sufficient. (Treaties and Conventions, 1776–1909, vol. 1, p. 140.)

Treaties with Columbia, 1846 (art. 23), and Italy, 1871 (Art. XIX), contain the same regulation. This regulation corresponds to article 218 of the Italian Mercantile Marine Code.

The treaty with Haiti of 1864, terminated 1905, was somewhat more detailed:

ART. 25. It is expressly agreed by the high contracting parties that the stipulations before mentioned relative to the conduct to be observed on the sea by the cruisers of the belligerent party toward the ships of the neutral party shall be applicable only to ships sailing without a convoy; and when the said ships shall be convoyed, it being the intention of the parties to observe all the regards due to the protection of the flag displayed by public ships, it shall not be lawful to visit them, but the verbal declaration of the commander of the convoy that the ship he convoys belongs to the nation whose flag he carries and that they have no contraband goods on board shall be considered by the respective cruisers as fully sufficient; the two parties reciprocally engaging not to admit under the protection of their convoys ships which shall have on board contraband goods destined to an enemy. (Ibid., p. 928.)

It will be observed that the declaration which the commander of the convoy is usually called upon to make is that the vessels under his escort have no contraband on board. With the modern extension of the possibilities of unneutral service such a declaration might shield a vessel which the visiting commander could properly seize. The articles in these treaties make no mention of blockade.

Treaty provisions as to convoy.—The United States very early made provision by treaty for the use of convoy in time of war. One of the earliest of these treaty agreements was with Sweden in 1783, a provision which is still in force, and is as follows:

ART. 12. Although the vessels of the one and of the other party may navigate freely and with all safety, as is explained in the seventh article, they shall nevertheless be bound at all times, when required, to exhibit as well on the high sea as in port their passports and certificates above mentioned; and not having

contraband merchandise on board for an enemy's port they may freely and without hindrance pursue their voyage to the place of their destination. Nevertheless, the exhibition of papers shall not be demanded of merchant ships under the convoy of vessels of war, but credit shall be given to the word of the officer commanding the convoy. (Ibid., vol. 2, p. 1729.)

Article IV of the treaty with Morocco of 1787 was renewed by the United States in the treaty of September 16, 1836:

ART. IV. A signal, or pass, shall be given to all vessels belonging to both parties, by which they are to be known when they meet at sea; and if the commander of a ship of war of either party shall have other ships under his convoy, the declaration of the commander shall alone be sufficient to exempt any of them from examination. (Ibid., vol. 1, p. 1213.)

Franco-British treaty, 1655.—A treaty between Great Britain and France of November 3, 1655, provided in Article XVI:

All ships of war, meeting any merchant ships of either party, shall protect them, while they keep the same course, against all who shall offer them any violence. (Du Mont. Corps Diplomatique, Tome VI, Pt. II, p. 121.)

Article XXVIII of the treaty between Great Britain and the States-General of July 31, 1667, was to the same effect.

Obsolete clause of Swedish treaty.—A separate article of the treaty of 1783 between the United States and Sweden which was not renewed in 1816 and 1825, when other portions of that treaty were renewed, provided as follows:

ART. III. If, in any future war at sea, the contracting powers resolve to remain neuter, and as such to observe the strictest neutrality, then it is agreed that if the merchant ships of either party should happen to be in a part of the sea where the ships of war of the same nation are not stationed, or if they are met on the high sea, without being able to have recourse to their own convoys, in that case the commander of the ships of war of the other party, if required, shall, in good faith and sincerity, give them all necessary assistance; and in such case the ships of war and frigates of either of the powers shall protect and support the merchant ships of the other: *Provided, nevertheless*, That the ships claiming the assistance are not engaged in any illicit commerce contrary to the principle of the neutrality.

Treaty with Prussia.—Article 22 of the treaty of 1785 between the United States and Prussia was practically identical with the similarly numbered article of the treaty of 1799. The treaty of 1785 expired by its own limitations in 1796. The treaty of 1799 expired by its own limitations in 1810. The provisions of article 22 were, however, among those revived by article 12 of the treaty of 1828, which was to be terminated only by regular notification. This article 22, which had been thus continued since 1785, appears in the Compilation of Treaties in Force, 1904, as follows:

When the contracting parties shall have a common enemy, or shall both be neutral, the vessels of war of each shall upon all occasions take under their protection the vessels of the other going the same course, and shall defend such vessels, as long as they hold the same course, against all force and violence in the same manner as they ought to protect and defend vessels belonging to the party of which they are. (Treaties in Force, 1904, pp. 641–642; Treaties and Conventions, 1776–1909, vol. 2, p. 1493.)

Article 14 of the treaty of 1785 with Prussia was renewed, with explanations in the treaty of 1799, and revived by the treaty of 1828.

ART. XIV. To insure to the vessels of the two contracting parties the advantage of being readily and certainly known in time of war, it is agreed that they shall be provided with the sea letters and documents hereafter specified.

1. A passport; expressing the name, the property, and the burthen of the vessel, as also the name and dwelling of the master, which passport shall be made out in good and due form, shall be renewed as often as the vessel shall return into port, and shall be exhibited whensoever required, as well in the open sea as in port. But if the vessel be under convoy of one or more vessels of war belonging to the neutral party the simple declaration of the officer commanding the convoy that the said vessel belongs to the party of which he is shall be considered as establishing the fact and shall relieve both parties from the trouble of further examination. (Treaties in Force, p. 638; Treaties and Conventions, 1776–1909, vol. 2, p. 1491.)

Treaties in time of war.—While it is often held that war terminates treaties between belligerents, this is evidently not the fact, as many treaties are merely suspended by the existence of war. These revive on the reestablishment of peace. Many conventions have been

negotiated in recent years which would become operative only in case of war between the contracting States and which are designed to meet such contingencies, as in the Hague Convention with respect to the Laws and Customs of War on Land—

> intended to serve as a general rule of conduct for the belligerents in their relations with each other and with the inhabitants.

There are other treaties and conventions in which the contracting powers make agreements which shall become operative when one of the parties is neutral and the other a belligerent, as the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War.

Ordinarily, however, the relations of a State, which is not a party to the war, to another State which is not a party to the war, are not changed by the existence of war between other States. As regards one another, they in general assume no new obligations or liabilities because of war foreign to both. New obligations may of course be assumed by conventional agreements, treaty or other.

When a State actually ceases to exist, the treaties by which it was bound are no longer effective. When Madagascar lost its separate entity and was absorbed by France in 1896, the United States and Great Britain readily admitted that their treaties with Madagascar were no longer binding. Similarly, when Hanover was incorporated in the Prussian Kingdom in 1866, treaties with Hanover were regarded as terminated. The complete extinction of a State will extinguish, so far as it is concerned, the treaties to which it is a party.

Renunciation of treaty rights with Tunis.—By a treaty of 1797 the United States and Tunis agreed—

> ART. V. If the corsairs of Tunis shall meet at sea with ships of war of the United States having under their escort merchant vessels of their nation, they shall not be searched or molested; and in such case the commanders shall be believed upon their word to exempt their ships from being visited and to avoid quarantine. The American ships of war shall act in like manner toward merchant vessels escorted by the corsairs of Tunis. (Treaties and Conventions, 1776–1909, vol. 2, p. 1795.)

By the treaty of Bardo, May 2, 1881, France assumed a protectorate over Tunis. It is evident that the assumption of this protectorate did not without further act terminate the treaty relations between the United States and Tunis. In order to provide for these relations certain articles were agreed upon by the United States and France on March 15, 1904:

The President of the United States of America and the President of the French Republic, acting in his own name as well as in that of His Highness the Bey of Tunis, desiring to determine the relations between the United States and France in Tunis and desiring to define the treaty situation of the United States in the Regency * * *

The Government of the United States declares that it renounces the right of invoking in Tunis the stipulations of the treaties made between the United States and the Bey of Tunis in August, 1797, and in February, 1824, and that it will refrain from claiming for its consuls and citizens in Tunis other rights and privileges than those which belong to them in virtue of international law or which belong to them in France by reason of treaties in existence between the United States and France. (Ibid., vol. 1, p. 544.)

• *Decisions in regard to treaties.*—In 1874, In re Hermann Thomas (12 Blatchford, Circuit Court Reports, p. 370), it was claimed that the extradition convention between the United States and Bavaria "was abrogated by the absorption of Bavaria into the German Empire." The decision of the court states that—

An examination of the provisions of the constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire and foreign countries were annulled or to be considered as abrogated. Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to rupture. (Federal Cases, No. 13887.)

In the case of Terlinden *v.* Ames, decided in February, 1902, Mr. Chief Justice Fuller said:

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided in substance that it should continue in force until 1858 and thereafter until the end of a 12 months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly other treaties may be terminated by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties can not be regarded as avoided because of impossibility of performance. (184 U. S. Supreme Court Reports, p. 270.)

This decision further says of the constitution of the German Empire:

Article 11 read: "The King of Prussia shall be the president of the confederation and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries; accredit ambassadors, and receive them. * * * So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union." but this is not material, for, admitting that the constitution created a composite State instead of a system of confederated States, and even that it was called a confederated Empire rather to save the amour propre of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obliga-

tions have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed. (Ibid.)

Opinion of Attorney General.—In case of deserters from a public vessel of the North German Confederation in 1868, the Attorney General of the United States gave an opinion that the provisions of the treaty with Prussia of May 1, 1828, relating to such matters would be operative. Mr. Evarts, the Attorney General, said:

In regard to naval vessels of the North German Union, I am clearly of opinion that they are ships of war of Prussia within the meaning of the treaty of 1828.

He further says:

The relations of the States of North Germany to one another and to the United States have been so considerably modified by the confederation of 1867 that many perplexing questions of reciprocal rights and obligations are likely to arise under those various treaties, and those questions it may be deemed the part of good statesmanship to avoid by new treaties adapted to the present condition of the North German States. (12 Opinions Attorneys General, p. 463.)

Opinion of J. C. B. Davis.—Mr. Davis in his notes on United States treaties says:

The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It can not be said that any fixed rules have been established.

Where a State has lost its separate existence, as in the case of Hanover and Nassau, no question can arise.

Where no new treaty has been negotiated with the Empire, the treaties with various States which have preserved a separate existence have been resorted to. (Treaties and Conventions between the United States and Other Powers, 1776–1887, p. 1234.)

Rule of the Declaration of London, 1909.—As a result of the deliberations of the International Naval Conference at London in 1908 and with the approval of Great Britain, hitherto unfavorable to the doctrine of convoy, the following rule was adopted:

ART. 61. Neutral vessels under the national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all the

information as to the character of the vessels and their cargoes which could be obtained by visit and search. (Naval War College, International Law Topics, 1909, p. 139.)

This article, like most treaty stipulations, applies to convoy of neutral ships by a war vessel of their own nationality. It might be very difficult for a commander of a ship of war to furnish the required information in regard to neutral vessels of another nationality, vessels over which he would have no authority.

Relation of treaty provisions to naval officer.—As the naval officer is frequently brought into contact with the persons, property, authorities, and laws of foreign States, it is necessary that, so far as possible, his duties be plain. His conduct, if he is not to involve his State in difficulties with foreign States, must have respect to the treaty obligations between the States. This is evident in the "Instructions to blockading vessels and cruisers," General Order No. 92, issued by the United States on June 20, 1898:

Vessels of the United States, while engaged in blockading and cruising service, will be governed by the rules of international law as laid down in the decisions of the courts and in the treaties and manuals furnished by the Navy Department to ships' libraries and by the provisions of the treaties between the United States and other powers.

Since the naval officer is bound by the treaties in force between the United States and other States, it is essential that where these treaties are doubtful, or where they are inconsistent with the understood policy of the United States, every effort should be made to inform the naval officer of such special provisions of treaties.

Of the treaties of the United States those with about 20 powers contained provisions in regard to convoy and others contained provisions in regard to protection. Some of these treaties have been terminated, but many remain in force, as Bolivia, 1858, article 23; Brazil, 1828, article 22; Colombia, 1846, article 23; Italy, 1871, article 19.

Discussion of treaty provision with Prussia.—Article XXII of the treaty between the United States and Prus-

sia of July 11, 1799, as stated, binds the two States when they "shall have a common enemy or shall both be neutral." In either case—

> vessels of war of each shall upon all occasions take under their protection the vessels of the other going the same course, and shall defend such vessels as long as they hold the same course against all force and violence in the same manner as they ought to protect and defend vessels belonging to the party of which they are.

While it may not be necessary for a ship of war engaged in convoying certain merchant vessels of her own nationality to receive on the high sea other vessels of her own nationality to the convoy if they request such protection, yet there would seem to be a strong obligation to do this if the vessels offered the same evidence of neutral character as afforded by those already under convoy. The article of the treaty with Prussia is, however, of such form as to leave to the naval officer little discretion, as it does not specify convoy, but provides for protection of vessels going on the same course, apparently providing for falling in with such vessels at sea. The provision is also made very comprehensive by the insertion of the words "upon all occasions." The only limitations upon the agreement to grant this protection are that the parties "shall have a common enemy or shall both be neutral," the vessels shall be "going the same general course," so long as the vessels "hold the same course," and be extended "in the same manner" as to the party's own vessels. In other words, this agreement binds each party to give to the vessels of the other when they have a common enemy or are both neutral the same degree of protection.

United States Navy Regulations.—The degree of this protection is indicated in the United States Navy Regulations for 1909, which provide as to the commander in chief:

> ART. 333. He shall afford protection and convoy, so far as it is within his power, to merchant vessels of the United States and to those of allies.
>
> ART. 334. During a war between civilized nations with which the United States is at peace he and all his command shall

observe the laws of neutrality and respect lawful blockade, but at the same time make every possible effort that is consistent with the rules of international law to preserve and protect the lives and property of citizens of the United States wherever situated.

From article 333, which makes it incumbent that the commanding officer "afford protection and convoy, so far as it is within his power, to merchant vessels of his own State," the manner of protection to be afforded to the German merchant vessels can be determined.

Protection by one neutral of vessels of another.—While the right of a neutral warship to take vessels of her own nationality under convoy gradually came to be generally admitted, the right of one warship to take under similar protection vessels of other neutral States was a different matter. This had been claimed in the last quarter of the eighteenth century, and many treaties implying such right had been made.

Even if the right should be admitted, the obligation of a war vessel of one neutral State to afford such protection to merchant vessels of another neutral State would be a different question. There would seem to be, in such case, lack of sufficient knowledge on the part of the commander of the war vessel as to the neutral vessel requesting protection and lack of sufficient authority over the merchant vessel of a foreign State.

The attitude of the United States on this matter was shown in the Navy Regulations of 1876, article 11:

Vessels of war are not to take under their convoy the vessels of any power at war with another with which the United States is at peace, nor the vessels of a neutral unless ordered to do so or some very particular circumstance render it proper, of which they are to advise the Navy Department at the earliest opportunity.

The regulations of 1909, article 333, state among the duties of the commander in chief:

He shall afford protection and convoy, so far as it is within his power, to merchant vessels of the United States and those of allies.

The degree of protection which a captain of a United States cruiser would give to an American merchant

vessel would depend somewhat upon the merchant vessel herself. If the vessel were guilty of violation of some law of neutrality, the captain would not be under obligation to protect her from the consequences. Even if the vessel were under his convoy, the commander of the cruiser of State X might make known to the American commander his suspicion that the merchant vessel was liable to capture, though the American captain, according to the Declaration of London, would alone be able to investigate such a charge. If the charge were found true, the merchant vessel might lose the protection of the convoy. In any case the captain of the American cruiser is free to protect or withdraw protection. If he protects the merchant vessel, the matter may become the subject of subsequent diplomatic adjustment, while, if he withdraws his protection without sufficient ground, his action may involve serious consequences to himself, his convoy, and his Government.

SOLUTION.

The captain of the United States cruiser should, in accord with special treaty provision and Navy Regulations, afford to the German vessels "protection and convoy, so far as it is within his power."

Situation III.

DESTRUCTION OF NEUTRAL VESSEL.

(It is granted in this situation that the Declaration of London is binding.)

There is war between the United States and State X. Great Britain is neutral. The United States fleet is sailing to make an attack upon a fortified port of State X. The fleet comes upon a British merchant vessel bound for a port of State X and equipped with wireless telegraph apparatus and having certain articles of contraband on board. The commander of the fleet does not wish to send the British vessel to a prize court, as such a court is at a great distance. He decided to destroy the vessel and to put the crew on board a collier which accompanies the fleet. The British master protests that this is in violation of his rights.

What are the rights in this case and what should be done?

SOLUTION.

The protest of the British master against the destruction of his vessel is correct.

The commander of the United States fleet may, if military necessity or treaty provision justifies, take or destroy the contraband on board the merchant vessel, and he may take measures to assure himself that the wireless apparatus will not be put to unneutral use.

NOTES.

Introduction.—This Naval War College has from time to time considered the question of destruction of private vessels in time of war. Prior to the adoption of any general international conventions relating to the treatment of vessels at sea in time of war the conclusions of the Naval War College have necessarily conformed as far as possible to the liberal policy of the past history of the United States. If conventions of recent years grant less exemption to merchant vessels than has been granted by earlier United States practice, if there be no

treaties or orders to the contrary, a naval officer will be under obligation to act in accord with the general conventions to which the United States may be a party. The drift of opinion and practice and the character of proposed conventional agreements show considerable change since the matter of destruction was quite fully discussed at this Naval War College in 1905.

Naval War College discussion in 1905.—Topic IV, proposed for discussion in 1905, was as follows:

Should the destruction of captured vessels be allowed before adjudication by a prize court? If so, under what condition?

The conclusion reached was:

Enemy vessels.—If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this can not be done may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered.

Neutral vessels.—If a seized neutral vessel can not, for any reason, be brought into port for adjudication, it should be dismissed. (International Law Topics and Discussions, Naval War College, 1905, p. 62.)

In the discussion of 1905 it was said:

The destruction of a neutral ship must be clearly distinguished from the destruction of a belligerent ship even under the principles at present generally accepted. If the belligerent's vessel is good prize it may be lost to that belligerent from the time when his opponent captures it. This is not always necessarily the case, because it may be recaptured or a court for some reason may not condemn the vessel. "Quarter-deck courts" should be avoided, except in extreme instances, even in deciding on the destruction of enemy vessels. Such vessels may have neutral cargo, which may be in no way involved in the hostilities. The principle of the Declaration of Paris that "neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag," may be involved in such manner as to make great caution necessary in destroying vessels of the enemy before adjudication.

Much greater care should be taken before destroying a neutral vessel itself. (Ibid., p. 72.)

Many arguments may be urged against the destruction of neutral vessels. Before destruction in any case, the crew, passengers, and papers must be taken from the neutral vessel on board the belligerent ship. These are then immediately subject to all the dangers of war to which a war vessel of a belligerent is subject. Such a position may be an undue hardship for those who have not been engaged in the war and one to which they should not be exposed.

A belligerent vessel, with crew, passengers, and papers of the destroyed neutral vessel, may enter a neutral port to which entrance with the vessel itself would be forbidden. This is in effect almost an evasion of the general prohibition in regard to the entrance of prize, because on board the belligerent vessel is the evidence upon which the decision of the prize court of the belligerent will be rendered. It is certain that a neutral State would be very reluctant to admit within its territory a belligerent vessel having on board the crew and papers of one of its own private vessels which the belligerent had destroyed. The belligerent vessel might thus obtain the supplies from the neutral which would enable it to carry to its prize court the evidence in regard to capture.

It does not seem possible in view of precedent and practice to deny the right of a belligerent to destroy his enemy's vessel in case of necessity. Of course, if the doctrine of exemption of private property at sea is generally adopted this right can no longer be sustained. (Ibid., p. 74.)

Discussions in 1907.—The subject of destruction of neutral merchantmen was again considered in Situation V of the International Law Situations of 1907. The situation proposed in 1907 was as follows:

War exists between the United States and State X. Neutral merchant vessels bound for a fortified port of State X and loaded for the most part with contraband are overtaken on the high seas by vessels of the United States Navy.

Some of these neutral merchant vessels are unseaworthy; some are overtaken at points too far from a prize court to make it advantageous to send the vessels in; others can not be cared for without impeding the action of the United States naval forces, which are in danger of immediate attack; and in other cases prize crews can not be spared to take the captured neutral merchantmen to a prize court.

What action may be taken by commanders of vessels of the United States Navy in such cases?

The solution offered was:

(*a*) If the contraband cargo and the seized neutral vessel have different owners, the contraband cargo, after proper survey,

appraisal, and inventory, and with consent of the master, if in accordance with treaty provisions, may be taken, and the vessel, if guilty only of the carriage of contraband, should be dismissed, and the papers relating to the whole transaction should be forwarded to the prize court.

(*b*) If the master does not consent, the vessel and cargo are liable to the usual penalties for contraband trade.

(*c*) If the neutral vessel and contraband cargo belong to the same owner, the contraband cargo may be treated as in (*a*). The vessel, however, should, if possible, be sent to a prize court for adjudication, otherwise the vessel should be dismissed.

(*d*) Destruction on account of military necessity of a neutral vessel guilty only of the carriage of contraband entities the owner to fullest compensation. Before destruction all persons and papers should be placed in safety. (International Law Situations, Naval War College, 1907, p. 74.)

The case of Knight Commander.—The discussion which followed the sinking of the British steamer *Knight Commander* by a Russian cruiser during the Russo-Japanese War in 1904 showed that many States had hardly conceived it as possible that a neutral merchant vessel carrying contraband could be destroyed before adjudication by a properly constituted prize court. The case of the *Knight Commander* is quite fully stated in the Situations for 1907. (Ibid., p. 84 et seq.)

Since the issue of the Situations of 1907 further details of the opinion of the Russian supreme court have been published, not merely as justifying the condemnation as prize, but particularly bearing on the destruction of the *Knight Commander:*

First of all must be remarked that the question as to the regularity of the sinking of the vessel did not pertain to the examination of the prize court, in absolute conformity with article 58 of the Naval Prize Regulations, but in accordance with the real sense of article 21 of the Naval Prize Regulations, and article 299 of the Naval Military Criminal Statutes, it may pertain to the examination of the naval authorities and the criminal court, inasmuch as the sinking of a vessel is allowed under the personal responsibility of the naval authorities, therefore, to judge whether in the present case the naval authorities sufficiently examined the extraordinary circumstances, which decided them to sink the vessel or whether these circumstances were insufficient can only be judged by the commanding authority who ordered the sinking of the vessel and not the prize court.

Besides this, in conformity with the same article 21 of the Naval Prize Regulations and clause 40 of the instructions relative to the manner in which the capture of vessels is to be effected based on article 26 of the prize regulations confirmed by the council of the admiralty, the fear that the vessel may fall into the hands of the enemy and the distance of a home port to which such vessels may be brought are conditions which justify the sinking of a vessel. The presence of these conditions in the sinking *Knight Commander* were duly established by an act on July 11, 1904; the question raised in the appeals that the sinking of neutral vessels is illegal is rejected in conformity with articles 11 and 21, which together clearly explain the irregularity of this point; in conformity with article 11 trading vessels of neutral nationality may be subject to capture; in accordance with the same article 21 all captured vessels may be sunk in extraordinary cases; thus, according to Russian law in force, the Russian prize court alone can properly decide this question, and the objections raised in the appeal are negative.

We can not, however, agree with the declaration made by the shipowners' attorney that the Russian law, in allowing "neutral vessels" to be sunk, is contrary to the principles of international law, if even in a double sense a "neutral vessel" is such as is neutral only through its nationality, although nowise neutral in its acts. In support of his position, the attorney cites a whole lot of passages from authors who declare themselves against the legality destroying vessels of neutral nationality. But the views taken by authors or learned men, although very authoritative, do not make it an obligatory rule of international law. It is well to adhere to such opinions, but one is not obliged to accept their execution.

Not citing the opposite view, it is not found unnecessary to draw attention to an article by Prof. Holland (Revue de droit international, 1905. no. 3) which exxpresses a doubt whether the sinking of a vessel of neutral nationality should be considered a violation of the principles of international law, especially in view of the circumstances that not only Russian law, but also the laws of France. the United States, and Japan admit the sinking of neutral prizes.

But not stopping within the limits of various authorities it is necessary to examine the questions from the very root. All agree that the principle of international law relative to maritime prizes should be based upon established compromises between the interests of the belligerents on the one side and neutrals on the second part—compromises which should guarantee the rights of all. From this point of view the destruction of a captured vessel of neutral nationality should not be admitted excepting in case of absolute necessity to the interests of the hostile parties. These

cases may, of course, occur much more seldom for the powers which luckily possess ports everywhere than for those which are in less favorable conditions, notwithstanding the most gross violation of neutrality by them, and would likewise in some conditions entirely prevent the belligerents from putting obstacles in the way of ammunition being brought to the enemy, which it is evident would be irregular and on the part of the other belligerent party who would be in more favorable conditions, it would be an injustice.

In point of view of international law, based upon the above, said compromise between the belligerents and neutrals does not even present itself as very comprehensible, wherefore several writers declare the admittance of the sinking of neutral vessels on which the cargo belongs to neutral owners and even the refusal of compensation for this cargo; but do not admit the sinking of the vessels of neutral owners which carry contraband of war in destination of the enemy's or for an enterprise carried out by the enemy, while in principle the center of weight of the question leads to the point that the legal interests of the owners should not suffer if it should occur in the interest of the belligerents that the vessel should have to be destroyed. But, in the existing Naval Prize Regulations of Russia, the most stringent defend the legal interests of the owners; these interests can scarcely suffer, inasmuch as if the captured cargo was to be confiscated in favor of the Crown, by destroying it, it is not the owners who suffer, but the Crown, which not only is deprived of the possibility of using the cargo, the Crown besides this having to pay compensation if, on the contrary, the prize destroyed turns out that it must be returned to the owners. (Arts. 28–30 and 32.) Regarding in part the objections made by the attorney of the shipowner that in allowing a naval authority to destroy a vessel amounts to giving him the right to decide the case in the place of a prize court—this objection presents itself more or less as a misunderstanding, as, according to the regulations relative to prizes, the instructions to naval authorities relating to the destruction of vessels has but the character of a practical measure called for in cases of necessity; but does not in any way lessen the instructions to prize courts relative to the right of the destruction of property. On the contrary, articles 21 and 74 stipulate that the case should be referred to a prize court for confirmation or liberation. But once the prize court has decided its compensation, the right of capture must, of course, be considered as belonging to the Crown from the time of its capture, and not from the time it was recognized as liable to confiscation, just the same as an inheritance belongs to the heirs from the time of the opening of the inheritance and not from the time the court probated it. In fact, the problem of prize courts consists in that they must recognize the prize—that is to say, if the capture was lawful or illegal; or, in other

words, to confirm the rights of capture or to refuse to confirm it. In general, prize courts do not create rights, but only confirm them. (Foreign Relations, U. S., 1906, Part II, p. 1328, published 1909.)

The Supreme Court at St. Petersburg decided:

1. To maintain the decision of the Vladivostok prize court and to leave the appeal made by Attorney Bajenoff, in behalf of the owner of the steamer *Knight Commander*, without consideration.

2. To leave the petitions of the attorneys, Sheftel and Berline, in behalf of the cargo owners of goods noncontraband of war, and for compensation for losses, with examination. (Ibid., p. 1331.)

Opinion of Prof. Holland.—The Russian court refers to the opinion of Prof. Holland. The British Admiralty Manual of Prize Law (sec. 303) directs that a vessel should be released unless there is clear proof that she belongs to the enemy. Prof. Holland, who prepared this manual, said in 1905 that these are the lenient British instructions in which there is not necessarily "any implication that instructions of a severer kind would have been inconsistent with international law."

Prof. Holland also says in 1905 that his opinion may be summarized as follows:

1. There is no established rule of international law which absolutely forbids, under any circumstances, the sinking of a neutral prize. A *consensus gentium* to this effect will hardly be alleged by those who are aware that such sinking is permitted by the most recent prize regulations of France, Russia, Japan, and the United States.

2. It is much to be desired that the practice should be, by future international agreement, absolutely forbidden—that the lenity of British practice in this respect should become internationally obligatory.

3. In the meantime, to adopt the language of the French instructions, "On ne doit user de ce droit de destruction qu'avec la plus grande réserve"; and it may well be that any given set of instructions (e. g., the Russian) leaves on this point so large a discretion to commanders of cruisers as to constitute an intolerable grievance.

4. In any case, the owner of neutral property, not proved to be good prize, is entitled to the fullest compensation for his loss. In the language of Lord Stowell:

"The destruction of the property may have been a meritorious act toward his own Government; but still the person to whom

the property belongs must not be a sufferer * * * if the captor has by the act of destruction conferred a benefit upon the public, he must look to his own Government for his indemnity." (Letters on War and Neutrality, p. 148.)

English court decisions.—Dr. Lushington in 1855 said:

I must again refer to the *Actaeon*. The act of destruction of the ship by Capt. Capel was in itself illegal, even if the vessel was liable to condemnation; it could only be justified on the grounds of public policy, and for illegal acts done for such a reason responsibility must attach. (The Leucade, Spinks, Prize Cases, 217.)

In the case of the *Actaeon*, in 1815, Sir W. Scott had said:

Lastly, it has been said that Capt. Capel could not spare men from his own ship to carry the captured vessel to a British port, and that he could not suffer her to go into Boston, because she would have furnished important information to the Americans. These are circumstances which may have afforded very good reasons for destroying this vessel, and may have made it a very meritorious act in Capt. Capel as far as his own Government is concerned, but they furnish no reason why the American owner should be a sufferer. (The Actaeon, 2 Dodson, Admiralty Reports, p. 74.)

Dr. Lushington, who prepared an earlier edition of the British Manual of Naval Prize Law also said in the case of the *Leucade:*

The destruction of a vessel under hostile colors is a matter of duty; the court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. It may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing in to adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor, where there is no neutral property on board. But for totally different considerations, which I need not now enter upon, where a vessel under neutral colors is detained, she has the right to be brought to adjudication, according to the regular course of proceeding in the prize court; and it is the very first duty of the captor to bring it in, if it be practicable.

From the performance of this duty the captor can be exonerated only by showing that he was a bona fide possessor and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer;

the captor must show a valid cause for the detention as well as the loss.

If the ship be destroyed for reasons of policy alone, and to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is that if a ship under neutral colors be not brought to a competent court for adjudication the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel for adjudication, it is his duty, under ordinary circumstances to release her. (The Leucade, (1885), Spinks, Prize Cases, p. 217.)

This case is frequently cited by those maintaining that British law demands the release of neutral prize if it can not be taken into port.

It is evident from this decision that the destruction of neutral ships as a matter of policy was not sanctioned and that for destruction cost and damages must be paid and under ordinary circumstances the ship should be released. From the point of view of the officer of a belligerent who is engaged in important naval operations the release of a neutral vessel might be a grave danger, and at the same time the destruction might involve the necessity of payment of damages. In the case of the *Felicity*, in 1819, Lord Stowell said of neutral property:

Where it is neutral the act of destruction can not be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own State; to the neutral it can only be justified, under any circumstances, by a full restitution in value. These are rules so clear in principle and established in practice that they require neither reasoning nor precedent to illustrate or support them. (2 Dodson, Admiralty Reports, p. 381.)

What might be a military reason for destruction would not concern the neutral owner, but would be purely a matter for the belligerent commander to settle with his superiors. The neutral who is not taking part in the war is to be fully recompensed and is entitled to damages. The policy of Great Britain as announced at the time of the Russo-Japanese War in 1904–5 and in the instructions of her delegates to the Second Hague Peace Conference in 1907 and the International Naval Conference in 1908 was against destruction of neutral vessels.

British opinion.—The memoranda submitted by the powers show that the larger number of the powers acknowledged the right to destroy captured vessels under certain conditions. Russia had destroyed neutral vessels during the Russo-Japanese War, and the Japanese regulations of 1904 had not forbidden such destruction.

While much has been said in regard to the matter in Great Britain some of the comment is certainly based upon a failure to understand the British practice. The British Manual of Naval Prize Law of 1888, edited by Prof. Holland, does say in article 303 that—

> If the commander is unable to spare a prize crew to navigate the vessel to a port of adjudication the commander should release the vessel and cargo without ransom, unless there is clear proof that she belongs to the enemy. (Int. Law Topics, 1905, p. 64.)

Of this subject Prof. Holland, writing in 1905, said:

> While it is, on principle, most undesirable that neutral property should be exposed to destruction without inquiry, cases may occasionally occur in which a belligerent could hardly be expected to permit the escape of such property, though he is unable to send it in for adjudication. The contrary opinion is, I venture to think, largely derived from a reliance upon detached paragraphs in one of Lord Stowell's judgments on the subject—judgments which, taken together, show little more than that, in his view, no plea of national interest will bar the claim of a neutral owner to be fully compensated for the value of his property when it has been destroyed without judicial proof of its noxious character. "Where doubtful whether enemy's property, and impossible to bring in, the safe and proper course," says Lord Stowell, "is to dismiss." The Admiralty Manual of 1888 accordingly directs commanders who are unable to send in their prizes to "release the vessel and cargo without ransom, unless there is clear proof that she belongs to the enemy." This indulgence can hardly, however, be proclaimed as an established rule of international law, in the face of the fact that the sinking of neutral prizes is under certain circumstances permitted by the prize codes, not only of Russia, but also of such powers as France, the United States, and Japan (1904). (83 Fortnightly Review, p. 802.)

Question of destruction at The Hague Conference of 1907.—The International Law Situations of 1907 of this Naval War College (Situation V, pp. 74–108) give an extended review of opinions, regulations, practice, etc., in regard to the destruction of neutral merchant vessels

before 1907. The Russian program for the Hague Conference of 1907 raised the question of "destruction, in cases of *vis major* of neutral merchant vessels detained as prize." The question proposed for discussion took the following form:

XI. Est-ce que la destruction des navires de commerce, sous pavillon neutre, chargés en temps de guerre du transport de troupes ou de contrebande de guerre, est défendue par les législations ou par la pratique internationale?

XII. Est-ce que la destruction, pour force majeure, de toutes prises neutres est illicite d'après les législations actuellement en vigueur et d'après la pratique des guerres navales?" (3 La Deuxième Conférence Internationale de la Paix, p. 1134.)

The following propositions were presented to the Hague Conference in 1907:

Great Britain:

La destruction d'une prise neutre par le capteur est interdite. La capteur doit relâcher tout navire neutre qu'il ne peut pas amener devant un tribunal de prises. (Ibid., p. 1170.)

Russia:

Estimant que l'interdiction absolue de la destruction des prises neutres par les belligérants aurait pour conséquence d'établir une situation d'infériorité marquante pour les puissances n'ayant pas de bases maritimes hors des côtes le da métropole et étant d'avis que tout accord international doit être fondé sur le principe de réciprocité et d'opportunité égale.

La Délégation Impériale de Russie soumet à la considération de la 4eme Commission le projet suivant d'une disposition se rapportant à la destruction des prises, disposition qui lui paraît tenir compte de tous les intérêts en jeu:

La destruction d'une prise neutre est interdite à l'exception des cas où sa conservation pourrait compromettre la sécurité du navire capteur ou le succès de ses opérations. Le commandant du navire capteur ne peut user du droit de destruction qu'avec la plus grande réserve et doit avoir soin de transborder préalablement les hommes et, autant que faire se pourra, le chargement et en tous cas, de conserver tous les papiers de bord et autres éléments nécessaires pour permettre le jugement de la prise ainsi que, le cas échéant, l'établissement des indemnités à attribuer aux neutres.

Il est bien entendu qu'en cas de saisie ou destruction des prises neutres reconnues illégales par la Cour des Prises ou par les autorités compétentes, les intéressés ont le droit à une action en dommages-intérêts. (Ibid., p. 1170.)

Japan:

AMENDEMENT AUX PROPOSITIONS BRITANNIQUE (ANNEXE 39) ET RUSSE (ANNEXE 40) SUR LA DESTRUCTION DE VAISSEAUX NEUTRES.

La descruction d'une prise neutre par le capteur est interdite. Le capteur doit relâcher tout navire neutre qu'il ne peut pas amener devant un tribunal des prises.

Toutefois, il est fait exception à la règle ci-dessus dans les cas suivants:

(*a*) Si le vaisseau est au service militaire ou naval de l'ennemi, ou sous son contrôle pour des buts militaires ou navals.

(*b*) Si le vaisseau résiste par la force à la visite ou à la capture.

(*c*) Si le vaisseau tente d'échapper à la visite ou à la capture par la fuite. (Ibid., p. 1171.)

United States:

Si pour une raison quelconque un navire neutre capturé ne peut être amené pour l'adjudication, ce navire devra être relâché. (Ibid., p. 1171.)

The British and Russian propositions were sustained at length by the representatives of those States.

The Russian delegate, Col. Ovtchinnikow, of the admiralty, presented the Russian view, which is important as showing the position of Russia after the events of the Russo-Japanese War:

(1) Tout d'abord je veux attirer l'attention de la haute Assemblée sur le langage confus employé dans la question, et qui peut faire naître quelquefois des malentendus.

Dans toutes les propositions, et même dans la nôtre, on se sert des expressions comme "la destruction d'une *prise neutre*," "un *navire neutre* capturé," etc.

Il ne s'agit en réalité pas de "navires neutres," mais de navires *de la nationalité neutre*, qui ont commis des infractions à leur neutralité.

Il n'y a de raison ni pour saisir, ni d'autant plus pour détruire, un navire de la nationalité neutre qui est réellement neutre. Mais un navire sous pavillon neutre, qui a violé sa neutralité par un acte hostile, ne peut être traité comme un navire neutre.

C'est dans le sens que je viens d'indiquer qu'il faut comprendre la proposition russe concernant la destruction d'une prise neutre.

(2) En discutant cette question il faut avoir en vue les considérations suivantes:

Au point de vue *juridique* il existe souvent quelque malentendu au sujet du rôle véritable *du fait* de la capture et du *jugement* du tribunal de prises.

Quel est le rôle d'une décision d'un tribunal de prises, et à partir de quel moment l'État capteur obtient-il le droit de propriété sur le navire et la cargaison saisis?

Je réponds à cette question tout à fait catégoriquement. C'est la *saisie* ou *capture* même qui donne à l'État capteur la propriété du navire et de la cargaison saisis. Une décision judiciaire ne crée jamais le nouveau droit, elle ne fait que reconnaître celui qui existait déjà avant. Le tribunal de prises statue si la prise est bonne ou non; c'est-à-dire, en appréciant les conditions de la saisie, le temps et le lieu où la saisie a été effectuée, le caractère du bâtiment capteur et celui du bâtiment et de la cargaison capturés, le tribunal de prises prononce son jugement sur la question si le navire et la cargaison ont été susceptibles de confiscation dans le moment où la saisie a été effectuée.

Dès lors, la décision d'un tribunal de prises a toujours une portée rétroactive, et, si la prise réellement est bonne, le droit de propriété existe pour l'État capteur à partir du moment de la saisie.

Ce fait étant établi, nous pouvons maintenant constater, qu'en détruisant le navire, qui navigue sous pavillon neutre, mais qui évidemment viole sa neutralité, le capteur détruit ses propres biens mais pas le bien d'autrui. C'est ainsi qu'il agit contre les intérêts de sa propre fortune, et voilà pourquoi seuls des cas tout à fait extraordinaires peuvent le forcer à se comporter de cette façon.

(3) Pour finir avec le côté juridique et pécuniaire de la matière, je veux présenter quelques observations supplémentaires:

(*a*) Il est bien entendu que chaque cas de destruction d'une prise doit être apporté à l'examen d'un tribunal de prises qui déclarera si la capture a été bonne ou non.

(*b*) Sur un bâtiment détruit, outre les objets qui sont susceptibles de confiscation à titre de contrebande de guerre peuvent se trouver d'autres qui auraient pu être affranchis par le tribunal de prises, s'ils avaient été amenés devant ce dernier et restitués de cette façon au propriétaire primitif.

La question se pose: Comment doivent être garantis les intérêts de ces propriétaires dans le cas de la destruction sur un bâtiment détruit de leurs objets ne constituant pas de contrebande?

La réponse sur cette question se trouve dans les articles 29 et 30 du règlement russe du 27 mars 1895 concernant les prises maritimes. Ce règlement porte:

ART. 29: "Si le chargement qui doit être restitué a été détruit par ordre de l'autorité, le propriétaire récupérera la

valeur du chargement détruit d'après une estimation basée sur les renseignements fournis."

ART. 30: "Indépendamment de cette valeur, une indemnité spéciale pour dommage, résultant de la capture, peut être allouée au propriétaire primitif s'il est reconnu que le chargement a été capturé sans motifs suffisants ou en violation des conditions prescrites.'

(*c*) En vertu de notre loi, le même principe d'indemnisation est applicable dans le cas où, selon le jugement d'un tribunal de prises, le bâtiment lui-même a été détruit incorrectement, c'est-à-dire lorsque ce bâtiment, dans le moment de la saisie, n'était pas susceptible de confiscation.

J'ai l'honneur d'attirer l'attention de la Commission sur les articles cités 29 et 30 du règlement russe, comme pouvant servir de matériaux pour les travaux du Comité d'Examen.

(4) Il y a encore une question qui peut soulever quelques doutes. C'est la question du sort de l'équipage et des passagers qui se trouvaient sur un bâtiment détruit.

Dans notre proposition (Annexe 40) il est clairement dit que "le commandant du navire capteur ne peut user du droit de destruction qu'avec la plus grande réserve et doit avoir soin de transborder préalablement les hommes."

On pourrait peut-être objecter à ce sujet, que l'équipage et les passagers transférés sur le navire capteur, c'est-à-dire sur un bâtiment de guerre, seront ici moins en sécurité contre les dangers de guerre que s'ils étaient sur leur propre navire.

Mais je réponds à cette objection qu'une pareille aggravation du sort de l'équipage a lieu, non par la faute du capteur, mais par celle de l'armateur ou capitaine, qui ont violé la neutralité d'un navire de commerce de nationalité neutre.

En tout cas, on peut constater que, pendant les dernières guerres, dans des cas de destruction des prises de nationalité neutre, la question du sort de l'équipage et les passagers n'a jamais provoqué de difficultés.

Voila les considérations d'ordre juridique qui prouvent que la destruction est, le cas échéant, non seulement admissible, mais licite.

(5) De plus, on peut invoquer dans cette matière des considérations purement pratiques et militaires.

Comme je viens de le constater, il est toujours bien préférable de conserver le bâtiment saisi et de le conduire dans un port de son pays.

Mais dans la guerre sur mer, il est souvent impossible de conserver ce bâtiment et de le conduire dans un lieu sûr, à plus forte raison de le relâcher.

Supposons par exemple, qu'à proximité du lieu de la capture se trouve un ennemi qui est beaucoup plus fort que le capteur,

le bâtiment saisi navigue sous pavillon neutre et est entièrement chargé d'objets de contrebande de guerre comme de cartouches, de projectiles, de poudres et d'explosifs de toute nature. Certainement pour le capteur ce serait beaucoup plus profitable de conserver ce bâtiment et ces objets de contrebande de guerre pour ses propres besoins. Mais le conservation et la conduite de cette prise sont impossibles à raison du voisinage d'un ennemi puissant.

Est-ce qu'on peut insister dans ce cas sur le relâchement du bâtiment saisi? Je crois qu'il est évident qu'un pareil relâchement serait pour le capteur une vraie trahison envers sa patrie. Il ne lui reste qu'à détruire cette prise.

D'autre part, la prise peut être quelquefois accidentelle. Un bâtiment de guerre, ayant un but spécial, rencontre en mer un navire entierèment chargé de contrebande de guerre, et fait la prise, pour ainsi dire, en passant.

À raison de ce que les ports du capteur sont trop éloignés ou bloqués, la conservation et la conduite de cette prise pourraient compromettre la sécurité du bâtiment capteur ou le succès de ses opérations. Il faut se demander comment doit agir dans ce cas le capteur?

Certainement cette question s'élève dans toute sa gravité seulement pour les Puissances qui n'ont pas un certain nombre de ports dans les mers éloignées. L'interdiction absolue de la destruction des prises établirait une situation d'infériorité marquée pour les Puissances n'ayant pas des colonies, vis-à-vis de celles qui en possèdent.

Les tendances, qui ont été exprimées dans certaines propositions, dont la Conférence a été saisie, concernant l'admission de prises dans les ports neutres, sembleraient même propres à aggraver cette infériorité.

Ainsi, dans l'exèmple que je viens d'indiquer, il est souvent facile pour le capteur de changer de cours et de conduire la prise dans un port de son pays qui est en voisinage. Si le capteur se dépêche, il peut envoyer sa prise dans ce port non eloigné sous le commandement d'un officier du bord.

On pourrait agir de même, et conduire ou envoyer la prise dans un port neutre, si l'accès et le séjour, assez prolongé pour les prises dans ces ports neutres, était admis par le droit conventionnel.

Mais, en absence d'un pareil accord international, et en présence des règles prohibant aux prises l'entrée et le séjour assez prolongé dans les ports neutres,—pour le capteur se trouvant dans les conditions que je viens d'indiquer, il ne reste qu'un choix: c'est de détruire le bâtiment saisi.

Voici les arguments d'ordre juridique, pratique et militaire, que j'ai l'honneur de présenter pour appuyer la proposition (Annexe

40) de la Délégation de Russie concernant la destruction des prises saisies, naviguant sous pavillon neutre, mais violant leur neutralité.

Je crois qu'il est évident que l'interdiction absolue de cette destruction est inadmissible, c'est-à-dire que cette destruction est licite. aux conditions indiquées dans la proposition sus-mentionnée. (Ibid., p. 898.)

The position of Great Britain was sustained by Sir Ernest Satow:

La théorie, selon laquelle le belligérant a le droit de couler bas une prise neutre, a été avancée, si je ne me trompe, pour la première fois, au cours de la récente guerre en Extrême-Orient. À l'envisager d'un point de vue général, il semble que c'est là un principe bien étrange et que, l'État belligérant et l'État neutre étant en paix l'un avec l'autre, la destruction d'un navire d'une Puissance amie constitue, de la part du belligérant, un acte d'aggression qu'il lui incombe de justifier. On peut nous objecter que ce raisonnement est également applicable au cas d'un navire neutre saisi et amené devant un tribunal de prises. Je suis le premier à admettre la force de ce raisonnement, mais il ne faut pas oublier que les puissances belligérantes exercent depuis très longtemps le droit de saisie et les droits judiciaires qui en découlent sans que les neutres s'y soient opposés, et que cette pratique, qui à première vue peut paraître illicite, a acquis de par ce fait un caractère de légalité que l'on ne saurait lui contester. Pouvons-nous dire que le cas est le même lorsqu'il s'agit du prétendu droit de couler la prise neutre? Je ne le crois pas. On ne peut citer, autant que je sache, aucune occasion où un État neutre ait reconnu, comme étant de bonne guerre, la destruction d'un de ses navires avant qu'un tribunal de prises ne l'eût condamné. Il semble donc qu'à moins de pouvoir démontrer l'existence d'une série de précédents à l'appui de ce prétendu droit ou moins d'un consentement dans le passé à l'exercice de ce droit de la part des neutres équivalent à une reconnaissance expresse de la légitimité de l'acte, on ne saurait maintenir que le droit international permet actuellement la destruction d'une prise neutre. Il existe peut-être des raisons pour ajouter à l'avenir aux droits que possède un belligérant celui de couler les prises neutres à la condition qu'il n'en soit pas fait un usage déraisonnable; ainsi l'on pourrait invoquer des considérations d'un ordre militaire, les nécessités du moment, le manque de ports et de dépôts de houille, la grandeur du théâtre de la guerre et l'étendue du mouvement commercial pour prouver que le besoin d'un changement s'impose; mais il n'est pas possible de soutenir que l'existence du droit que l'on cherche à établir a été reconnu dans le

passé. Un de nos plus éminents professeurs de droit international en Angleterre a même soutenu que les textes des jurisprudences de certains pays impliquaient l'existence de ce droit, mais une étude de ces textes nous a permis de constater qu'il avait fait erreur et que ceux-ci, quoique ne mentionnant les prises qu'en termes généraux et n'excluant pas expressément les prises neutres, visaient surtout les prises ennemies, au sujet desquelles il ne saurait y avoir aucun doute, puisque le droit de les couler dans certains cas a été reconnu depuis longtemps aux belligérants. Mais, même si l'intention du législateur dans ces pays avait été de concéder ce droit par rapport aux prises neutres, le fait n'aurait eu aucune valeur au point de vue international, puisqu'un État ne peut pas introduire des éléments nouveaux dans le droit international sans le concours des autres États et c'est précisement ce concours qui manque dans l'espèce. (Ibid., p. 907.)

The British delegate also maintains that it is evident that the principle of release of a neutral vessel which can not be sent to a prize court is generally accepted, and says:

L'adoption d'un nouveau principe donnant aux belligérants le droit de couler bas les prises neutres conduirait fatalement à des abus et exposerait tout navire neutre a être coulé chaque fois qu'il rencontrerait un navire de guerre belligérant, dont le capitaine ne manquerait pas d'user de son droit comme bon lui semblerait, nonobstant les ordres qu'il pourrait avoir reçus de n'agir qu'avec circonspection. Le navire neutre se trouverait donc dans le même cas que le navire ennemi, et sa situation serait même pire, puisque son gouvernement n'aurait aucun moyen de redresser le tort commis, à moins de déclarer lui-même la guerre au belligérant capteur.

Le Gouvernement britannique est donc d'avis que l'usage établi ne permet pas la destruction de la prise neutre et il pense qu'il n'est pas du tout désirable de modifier en quoi que ce soit cet état des choses. (Ibid., p. 903.)

Count Tornielli, of Italy, thought that difficulties which had arisen upon the question of destruction might be reconciled by the introduction of the right of sequestration in a neutral port pending adjudication by a prize court. (Ibid., p. 903.)

Dr. Kriege, the German delegate, said:

La Délégation allemande partage entièrement la manière de voir de la Délégation russe en ce qui regarde la destruction des navires neutres. Elle est d'avis que la destruction est permise

par le droit international actuel, qu'elle est indispensable au point de vue militaire et qu'elle ne comporte pas de rigueurs excessives à l'encontre du propriétaire du navire. * * * Il me sera permis, enfin, de dire quelques mots sur les appréhensions des propriétaires des navires neutres coulés. Il n'y a que deux cas possibles: la capture du navire est justifiée ou elle ne l'est pas. Dans la première hypothèse, la juridiction des prises devra confirmer la prise, le propriétaire perdra son navire qu'il soit amené dans le port ou qu'il soit détruit. Le propriétaire ne serait donc pas fondé à se plaindre de la destruction. Dans le second cas, il n'y a aucun doute que l'État capteur doit répondre des actes du croiseur et dédommager le propriétaire de la perte qui en est résultée. Si la prise a été détruite, il sera donc tenu de lui payer la valeur entière du bâtiment et de sa cargaison. Le tribunal des prises en prononcant la non-validité de la capture sera appelé à fixer le montant de cette indemnité. Si nous parvenons, comme nous pouvons espérer, à établir une jurisdiction des prises internationales, les intérêts du propriétaire du navire et des marchandises, détruits à tort, seraient désormais entièrement sauvegardés.

Ce sont les raisons, Messieurs, qui nous conduisent à appuyer la proposition russe. (Ibid., pp. 992, 993.)

The subsequent discussion of the subject of destruction of neutral merchant vessels became closely joined with the discussion of the proposition to permit sequestration of vessels which had been seized and had not yet been adjudicated upon by a prize court.

The General Report of the Fourth Commission which had the question of destruction of neutral prizes under consideration stated that the commission had not been able to reach an agreement, saying:

Tel est le résultat de ces délibérations, qu'on peut résumer, semble-t-il, comme il suit: Le libre accès des ports neutres pour les prises des belligérants est l'objet d'une faible majorité—l'interdiction de détruire, plus ou moins subordonnée par la plupart à ce libre accès, est l'objet d'une majorité un peu plus marquée—enfin, en toute hypothèse, le droit de détruire est l'objet lui-même d'une faible majorité et de nombreuses abstentions et dans ces conditions il a semblé qu'une entente était actuellement difficile. (Ibid., p. 264.)

The United States and other powers have reserved their assent to article 23 of the Convention concerning the Rights and Duties of Neutral Powers in case of Maritime War, which allows sequestration of prizes in neutral ports pending adjudication which would have had more justi-

fication had the destruction of neutral prizes been prohibited. The question of destruction of neutral prize would become an important one in case of the establishment of the proposed international prize court. This therefore became an important topic in the program of the International Naval Conference of 1908–9.

Question of destruction of prize at International Naval Conference.—In the call issued by Great Britain for the International Naval Conference in 1908 the fourth topic on the program for discussion was, "The legality of the destruction of neutral vessels prior to their condemnation by a prize court." The British Government gave to its delegates to this conference more extended instructions upon this topic than upon any other except contraband. As the British position represented one of the extreme views, the instructions may be given at length:

27. It is recognized by the universally acknowledged principles of international law that all prizes ought, if possible, to be brought into a prize court, and ought not, generally speaking, to be destroyed or otherwise dealt with prior to condemnation. It is, however, generally admitted that in cases in which the captor finds himself unable, without compromising his own safety or affecting the success of the military operation on which he is engaged, or owing to his distance from any home port, to bring an enemy merchant vessel in, he may destroy her after removing the passengers, crew, and papers, and that if it be established that she is in fact an enemy vessel, such destruction involves the captor in no liability. Even in such cases, His Majesty's Government have some doubt whether there is a right to destroy neutral cargoes on board without compensation, a doubt which the terms of the Declaration of Paris, under which neutral goods in enemy ships not being contraband are not liable to seizure, tend to confirm. Primarily, an enemy ship should be brought in, and if she is, before adjudication, destroyed for the convenience of the captor the neutral owner of cargo should not suffer thereby.

28. Some of the powers do not consider this right of destruction in special circumstances to be limited to enemy ships, but seek to extend it to neutral merchant vessels suspected to be carriers of contraband of war. They declare that although it is contrary to principle to destroy a neutral merchant vessel instead of bringing her in, such a course may nevertheless be justifiable in exceptional cases, where she can not so be brought in without danger to the captor or without substantial interference with the success of his military operations; and it has been contended both

by writers on international law and in discussion at the Second Peace Conference that this right would extend to a case in which the captor was merely unable to spare a prize crew to take the vessel into one of his own ports without unduly diminishing his fighting force. Great Britain, on her part, has always held that in case of a neutral ship or in case of doubt as to nationality, if the prize can not be brought in, she should be dismissed, and that no military necessity can justify to the neutral owner the destruction of his ship without due process of a prize court. In the few recorded cases where in past times neutral prizes have been so destroyed by English captors the court decreed full compensation as due of right to the owners for the wrong done to them. At the Second Peace Conference Great Britain endeavored unsuccessfully to obtain general recognition for the rule that destruction of neutral prizes should in all circumstances be forbidden. The result of the discussions at that conference has been to show that there is practically no prospect of this contention being accepted in its entirety, and it must be admitted that while authority can be quoted in its support from textbooks and from British cases, there is a large body of opinion among writers on international law that although in principle a neutral ship should in every case be brought in or released, circumstances might arise in which its immediate destruction would be justified.

29. The matter is clearly one of much importance to neutral traders, and its importance is illustrated and accentuated by Russian action and Russian decisions during the recent Russo-Japanese War, when, as it appeared to His Majesty's Government, neutral vessels were destroyed without justification, but the legitimacy of such destruction was sustained by the Russian prize courts. It is therefore very desirable that some agreement should, if possible, be come to at the forthcoming conference which would afford a real check on belligerents in this respect. The way to an agreement might perhaps be found by proceeding on the lines of an affirmation of the general principle that neutral prizes must not be destroyed before adjudication, followed by a precise statement of the conditions on which alone a departure from the principle could be allowed in exceptional circumstances. These conditions would have to be so framed as to safeguard the rights and interests of neutrals in as effective a manner as possible.

30. His Majesty's Government can not admit the contention that inability of the captor to spare a prize crew would suffice to justify destruction. Such an admission would probably be held to authorize the destruction of neutral prizes in the majority of cases where the captor had not a port of his own near to the place of capture. It is to be expected that the duty of intercepting merchant vessels for visit and examination will often be

intrusted to vessels of great speed and considerable offensive but small defensive powers, and unable conveniently to carry crews larger than requisite for the ordinary duties of the vessel. Such vessels would seldom be able to spare a sufficient number of men to form prize crews, and they would therefore frequently be in the position of not being able to send in a prize without weakening their fighting force, and thus, as it might be argued, affecting their safety and the success of their operations. No doubt this danger is to some extent qualified by the fact that it would be difficult for such vessels to accommodate the passengers and crew of the prize, and unless they were able to do this, their only course would be to take the prize into port under their guns, which would be almost impracticable if the port was at some distance from the place of capture. Clearly the crew and passengers on board a neutral vessel, which may perhaps include women and children, ought not to be exposed to the hardships and risks which would arise if they were to remain for any length of time on board a belligerent man-of-war. Such a ship might, while these persons were still on board, be in action with an enemy, and nothing short of an altogether imperative necessity could justify a belligerent in exposing them to such a peril.

31. The conditions which His Majesty's Government consider might fairly be attached to a recognition on their part of the right to sink neutral prizes would be that the emergency should be justified by an imperative military necessity of which the prize-courts, and ultimately the international court, should be the judge, and that the crew and passengers must not, whilst on board a belligerent vessel, be exposed to the perils of a naval engagement. An effort should be made to secure the adoption by the conference of the view that inability to spare a prize crew, or the mere remoteness of a convenient national port, does not constitute a military necessity which would justify the sinking of a neutral prize. An agreement to this effect would gain enormously in value if it were also stipulated that in all cases where a neutral ship is sunk before adjudication in a prize court the owners should be entitled to full compensation, altogether apart from the question of the character of the traffic in which the ship was engaged.

32. When this subject was debated at the Second Peace Conference various suggestions were put forward from different quarters with a view to provide an alternative to destruction in cases where a vessel could not be brought into a national port. It is not improbable that some of those suggestions may be renewed on the present occasion. The principal proposal in this direction was that the captor should be permitted, when a prize has been captured at a long distance from any of his ports, to take her into a neutral port within reach, where she would be sequestrated pending the adjudication of the prize court, to

which, meanwhile, the ship's papers and the necessary witnesses were to be sent as soon as practicable. His Majesty's Government have declined to accept article 23 of the convention signed at The Hague respecting the rights and duties of neutral powers in maritime war which authorizes this procedure. I am not now in a position to say what view His Majesty's Government might have taken as to the advisability of accepting the proposal with or without some modifications or restrictions had its advocates offered it as a compromise in return for which they would abandon the claim to sink neutral prizes. It was in this form that the proposal was originally put forward. In the end, however, the claim to sink was maintained, and the alternative suggestion was ultimately set up as an additional stipulation. In these circumstances His Majesty's Government did not feel justified in making the double concession involved in recognizing the general validity of practices which are clearly open to grave objections. I have already indicated the readiness of His Majesty's Government to consider how and to what extent those objections might be overcome as regards the destruction of neutral prizes. I do not, however, wish at this stage to fetter you by declaring the conditions formulated in paragraph 31 of the present instructions to offer the only possible solution that could be entertained by His Majesty's Government. On the contrary, their genuine anxiety for some understanding in this matter will dispose them to approach any proposals for a reasonable compromise in an unbiased and conciliatory spirit. Without committing themselves to any definite decision, His Majesty's Government will accordingly be willing to listen and give due weight to any arguments and suggestions that may be brought forward in order to harmonize the opposing views by reopening the question of the sequestration of neutral prizes in neutral ports, although, as at present advised, they are not very hopeful that any system can be devised which would prove really satisfactory and acceptable to all parties.

33. A suggestion has been made that it should be open to the captor and the captain of the prize, by agreement, to arrange that any contraband cargo on board should be handed over or destroyed, or that some form of bail might be given by the captain of the prize, to which he would subsequently have to surrender in one of the captor's prize courts, and that if either of these courses were adopted, the ship might be allowed to proceed. It has been argued that the possibility of this alternative to bringing the prize in would render it unnecessary, in any contingency which may be contemplated as probable, to resort to its destruction. This suggestion has been carefully examined, but His Majesty's Government have so far been unable to satisfy themselves that effect could be given to it without giving rise to

complications of a practical and legal character which would render the framing of the necessary rules a task of great difficulty. You are, however, authorized to take into consideration and discuss any definite proposal which may be brought forward relating to this subject. (International Naval Conference, British Parliamentary Papers, Miscellaneous, No. 4, 1909, p. 28.)

Propositions before the International Naval Conference.—The propositions submitted to the International Naval Conference in 1908 varied widely and were based on different theories as to neutral and belligerent rights as well as upon different ideas as to what might be practically advantageous to the respective naval powers.

Germany proposed:

24. Les navires et marchandises capturés doivent être conduits au siège d'un Tribunal de Prises du belligérant capteur pour y être jugés.

25. Par exception, les navires ou marchandises capturés peuvent être immergés, coulés, ou détruits autrement si leur conservation pourrait compromettre la sécurité du bâtiment de guerre ou le succès de ses opérations.

Avant la destruction du navire, son équipage devra être mis en sureté et tous les papiers du bord et telles autres pièces que les intéressés jugeront importantes pour l'établissement de la validité de la capture devront être transbordés sur le bâtiment de guerre.

26. Dans les cas prévus à l'alinéa 1[er] de l'article 25, on pourra également immerger ou détruire, avec le navire, les marchandises qui ne sont pas susceptibles de confiscation, et qui, en raison des circonstances, ne peuvent être transbordés sur le bâtiment de guerre. Dans ce cas, le propriétaire de ces marchandises aura droit à une indemnité. (Ibid., No. 5, p. 99.)

The United States renewed the instructions as found in the Naval War Code of 1900:

ART. 46. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest suitable port, within the territorial jurisdiction of the United States, in which a prize court may take action.

ART. 49. The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel or its cargo is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

ART. 50. If there are controlling reasons why vessels that are properly captured may not be sent in for adjudication—such as unseaworthiness, the existence of infectious disease, or the lack

of a prize crew—they may be appraised and sold, and if this can not be done, they may be destroyed. The imminent danger of recapture would justify destruction if there should be no doubt that the vessel was a proper prize. But in all such cases all of the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

Austria proposed that the destruction of neutral prizes should be reduced to the minimum.

Spain suggested:

(D) Les prises neutres ne sauraient être détruites par le capteur tant que le tribunal compétent ne les ait pas déclaré légales. L'application de ce principe pourra toute fois être subordonnée par les puissances signataires de la future convention à l'acceptation des prescriptions contenues dans la " Convention concernant les droits et les devoirs des puissances neutres en ces de guerre maritime " au sujet de l'accès des prises neutres aux ports neutres. Mais même dans ce cas la destruction ne serait justifiée que par des raisons résultant de l'état de la mer, des conditions des navires capteurs et capturés pour naviguer ou du manque de combustibles ou vivres, et non pas de la proximité de l'ennemi ou du manque d'éléments militaires suffisants pour assurer la conduction au port correspondent. Ces derniers motifs et d'autres analogues impliquent que le capteur ne possède pas assez de moyens pour mener à terme la saisie. (Ibid., p. 100.)

France would make the destruction of neutral prize exceptional:

En principe, les prises doivent être amarinés, conduites dans un port national ou allié, et non pas détruites.

Toutefois, le capteur est autorisé à détruire toute prise dont la conservation compromettrait sa propre sécruité ou le succès de ses opérations, notamment s'il ne peut conserver la prise sans affaiblir son équipage.

Il ne doit être fait usage de ce droit de destruction qu'avec la plus grande réserve envers les navires ennemis, et *a fortiori* envers les navires neutres. La destruction d'un navire neutre doit être tout à fait exceptionnelle.

En cas de destruction, le capteur doit avoir soin de conserver tous les papiers de bord et autres éléments nécessaires pour permettre le jugement de la prise. (Ibid., p. 101.)

Great Britain maintained its earlier position:

1. Le devoir d'un belligérant capteur est d'amener, pour qu'il soit jugé par un tribunal des prises, tout navire marchand qu'il a saisi. Lorsque c'est impossible, ce dernier, si c'est un navire ennemi, peut être détruit après retrait de l'équipage et des papiers

de bord; si la nationalité du navire est neutre, ou s'il y a un doute quelconque quant à la nationalité, il devrait être relâché, car sa destruction ne peut être justifiée, entre le propriétaire neutre et le capteur, par une nécessité quelconque de la part d'un belligérant.

2. Un chargement neutre licite à bord d'un navire ennemi n'étant pas saisissable, le propriétaire de ce chargement a droit à l'indemnité si le navire ennemi est détruit. (Ibid., p. 101.)

Italy did not assume any very positive position:

(*d*) Les questions, concernant le droit de procéder à la destruction des navires marchands, soit ennemis que neutres, avant que le tribunal des prises se soit prononcé, ne sont pas réglées expressément par le droit positif italien.

Dans un cas spécial il a été décidé que le propriétaire d'un navire neutre de commerce, détruit avant que la capture n'en ait été soumise au jugement régulier du tribunal des prises, n'aurait aucune raison et aucun intérêt à porter plainte, lorsque le navire se trouvait dans des conditions qui en justifiaient légalement la capture et la confiscation. (Cont. dipl., 16 décembre 1859, capture du navire "Fama Argentine.") (Ibid., p. 101.)

Japan assumed a position similar to that of Great Britain:

Les commandants des bâtiments de guerre belligérants sont tenus d'envoyer pour être mis en jugement les navires neutres après saisie. Si, pour une raison quelconque, ils ne peuvent le faire, les dits navires ne devraient être détruits avant condamnation. (Ibid., p. 101.)

The Netherlands proposition involved sequestration:

IV. (1) Un navire neutre capturé doit être relâché par le capteur, s'il ne peut être conduit dans un port du capteur ou dans un port neutre, en attendant la décision du tribunal des prises (conformément à l'article 23 de la Convention concernant les droits et les devoirs des puissances neutres en cas de guerre maritime).

(2) Dans le cas visé dans l'alinéa précédent le belligérant pourra, sans détruire le navire, prendre toutes les mesures pour empêcher que la contrebande n'atteigne sa destination ennemie. Le tribunal des prises appréciera le bien-fondé des mesures prises.

(3) Dans les circonstances mentionnées sub (1), un navire ennemi peut être détruit après que l'équipage et les papiers de bord auront été mis en sûreté.

(4) Le propriétaire sera indemnisé de la destruction de sa cargaison si celle-ci n'était pas sujette à confiscation. (Ibid., p. 101.)

Russia was rather more liberal than most other States:

IV. ARTICLE 1^er^. La destruction d'un navire de nationalité neutre, saisi et sujet à confiscation, est interdite, à l'exception des cas où sa conservation pourrait compromettre la sécurité du navire capteur ou le succès de ses opérations.

ART. 2. Dans les cas prévus à l'article 1^er^, le commandant du bâtiment capteur est tenu, avant de faire détruire le navire, d'en transborder les hommes et, autant que faire se pourra, la cargaison, ainsi que de prendre les mesures requises pour conserver tous les papiers de bord et, s'il y a lieu, d'autres objets qui pourraient être nécessaires pour le jugement par devant le tribunal des prises. (Ibid., p. 102.)

Basis of discussion at the International Naval Conference.—As a result of the comparison of the various propositions and comments the following observations and bases of discussion were offered to the conference at its opening session and formed the point of departure for its work:

OBSERVATIONS.

1. ***Destruction des prises neutres.***—Tout le monde est d'accord pour reconnaître qu'en principe une prise neutre doit être conduite dans un port de prise et faire l'objet d'une décision de cour de prises.

Certains Gouvernements considèrent que ce principe général est absolu et ne souffre pas d'exceptions. D'autres Gouvernements ont admis dans leur pratique la faculté exceptionnelle pour le capteur de détruire la prise dans certains cas déterminés. Cette faculté exceptionnelle doit-elle être reconnue comme constituant une interprétation généralement acquise du principe commun?

BASE DE DISCUSSION.

30. En principe une prise neutre doit être conduite dans un port de prise.

31. L'obligation de conduire le navire neutre capturé dans un port de prise doit-elle être interprétée comme absolue ou comme souffrant des exceptions?

OBSERVATIONS.

2. ***Destruction des propriétés neutres à bord d'une prise ennemie.***—Une question connexe à la précédente a été visée par un certain nombre de mémorandums; il s'agit du cas où une propriété neutre à bord d'un navire ennemi s'est trouvée comprise dans la destruction de celui-ci. Des propositions de stipu-

lation conventionnelle peuvent ou pourront été faites à cet égard; mais dans la pratique actuelle le principe général reconnu, d'après lequel la marchandise neutre sous pavillon ennemi n'est pas saisissable, doit-il être interprété en ce sens qu'en cas de destruction le propriétaire de cette marchandise doit être indemnisé de sa valeur? ou qu'en pareil cas il y a un fait de guerre ne donnant pas lieu légalement jusqu'ici à une responsabilité pécuniaire à la charge du belligérant?

BASE DE DISCUSSION.

32. Le principe d'après lequel la marchandise neutre se trouvant à bord d'un navire ennemi n'est pas saisissable, doit-il être interprété en ce sens qu'en cas de destruction du navire le propriétaire de cette marchandise doit être indemnisé? ou qu'en pareil cas la destruction du navire constitue un fait de guerre ne donnant pas lieu légalement à une responsabilité pécuniaire à la charge du belligérant? (Ibid., p. 102.)

It will be seen that these bases of discussion were not in the positive form which was given to some of the topics placed before the conference, and this was simply an evidence of the divergence of view which prevailed at the outset.

Discussion at the International Naval Conference.—The discussion at the Naval Conference of 1908–9 upon destruction of neutral prize was very full, and the delegates having technical knowledge of the effect of destruction upon naval operations gave special attention to the subject.

The position taken by Russia at the Hague Conference of 1907 was reaffirmed and supported by arguments similar to those brought forward in 1907. The Russian delegation showed that the wording of the Japanese rules of 1904 did not prohibit destruction of neutral prize and that article 50 of the United States Naval War Code of 1900 made no distinction between the destruction of neutral and enemy merchant vessels.

The German plenipotentiary supported the Russian contention, also reaffirming the position taken in 1907, and stating that—

Dans la pratique mon Gouvernement a reconnu l'existence du droit de destruction lorsqu'il avait été pendant la dernière guerre

appliqué par le Gouvernement russe contre le navire allemand *Théa*. Ce navire ayant été saisi pour cause de contrebande et coulé à fond en raison de l'impossibilité de le conduire dans un port de prise, le Gouvernement allemand s'est abstenu de toute protestation contre cette mesure et s'est borné à soutenir la réclamation des propriétaires allemands contre la légitimité de la capture. Au cours de l'instruction devant la juridiction des prises la capture du *Théa* n'a pas été maintenue et les intéressés ont obtenu dédommagement plein et entier des pertes qu'ils avaient subies. Ce cas me paraît particulièrement intéresant au point de vue des conséquences du droit de destruction, parce que, en l'espèce, la capture et partant la destruction n'étaient pas justifiées et que, malgré cela, les intéressés n'ont pas eu de quoi se plaindre et se sont trouvés bien en fin de compte de la manière dont ils ont été traités. Il paraît donc que le droit de destruction ne recèle point les dangers qu'on a voulu signaler.

Parmi les Puissances nommées dans l'exposé de M. le Baron Taube, il y a encore une autre qui pendant la dernière guerre a observé dans une situation analogue une attitude pareille à celle de l'Allemagne. Le navire anglais *Knight Commander*, qui avait été détruit par un bâtiment de guerre ruses, avait eu une cargaison appartenant en partie à des citoyens des États-Unis d'Amérique. Le Département d'État de Washington, ayant été saisi d'une réclamation de ce chef, a alors pris position dans un télégramme, en date due 6 août 1904. Il y déclare expressément ne pas pouvoir fonder une réclamation sur la thèse suivant laquelle un belligérant capteur ne serait pas en droit de détruire une prise en cas de nécessité impérieuse.

After speaking of the differences in judicial systems in accordance with which the title to prize passes by one system on capture if condemnation ensues and by another only after judgment by a prize court, the German plenipotentiary also says:

Il faut plutôt examiner si, indépendamment de la question juridique, le navire est en fait définitivement perdu pour le propriétaire et acquis au capteur. En cas de réponse affirmative, le capteur peut en disposer comme de son propre bien. Par conséquent, nous réclamons le droit de détruire une prise neutre en cas de nécessité lorsqu'elle est sujette à confiscation. Si, au contraire, le navire lui-même ne peut pas être confisqué, le fait qu'il a de la contrebande à bord ne suffit pas pour justifier sa destruction. Il est vrai que le capitaine du croiseur pourrait par suite d'une appréciation erronée des faits détruire comme passible de confiscation un navire qui ne le serait pas en réalité. Mais la grave responsabilité qu'entraînerait un abus du droit de des-

truction rendra bien rares des cas semblables et le propriétaire n'aurait pas à en souffrir. Car, au lieu du navire qui ne pourrait être restitué, le tribunal des prises devrait lui allouer une indemnité qui le dédommagerait entièrement de sa perte. En ce qui concerne la cargaison d'un navire qu'on a le droit de détruire, les marchandises confiscables peuvent librement être détruities avec le navire. Le reste de la cargaison doit être transbordé sur un autre navire, si les circonstances le permettent. Dans le cas où ces marchandises seraient coulées avec le navire, nous proposons, à la différence du mémorandum français, de reconnaître au propriétaire le droit à une indemnité convenable.

Je passe à une autre objection qu'on a voulu soulever contre le droit de destruction. On a dit que le destruction ne saurait être reconnue comme licite, puisqu'elle préjugerait indûment les chances de la guerre, en rendant impossible la reprise de la prise neutre par l'adversaire. Mais, abstraction faite du peu d'importance de cet argument, la même objection pourrait être faite à propos des navires sous pavillon ennemi. La situation est analogue en ce qui concerne les considérations d'ordre humanitaire alléguées contre la destruction des prises neutres. On a dit que les passagers qui s'embarquent sur un navire ennemi savent à quel danger ils s'exposent; mais cela n'est plus vrai lorsqu'il s'agit d'un navire ennemi qui a quitté son dernier port de départ avant le commencement de la guerre et qui est rencontré en mer ignorant des hostilités. Tout de même, la Convention concernant le régime des navires de commerce ennemis au début des hostilités, élaborée par la Deuxième Conférence de la Paix, reconnait expressément le droit des belligérants de détruire ces navires. (Ibid., p. 171.)

The American delegation stated its position briefly:

La Délégation américaine accepte la base de discussion No. 30. Toutefois, la délégation reconnaît qu'il peut, dans certain cas, être impossible de conduire la prise dans un port soumis à la juridiction du belligérant. Dans ce cas, la prise doit être relâchée à moins que des nécessités militaires impérieuses n'exigent sa destruction, mais alors les officiers et l'équipage du navire coulé doivent être mis en sécurité.

Les cours de prises decideront, s'il y a lieu, à accorder des dommages-intérêts et en fixeront le montant. (Ibid., p. 272.)

The British delegation made an extended argument upon "ce problème difficile et épineux," showing the opinion of Kleen and Calvo the practical working of a rule allowing destruction, the weight of cases decided in English courts and maintaining the justice of a rule pro-

time that it will secure reparation in cases where there was no reason for the destruction.

Such is the general spirit of the provisions of this chapter.

ARTICLE 48.—*A neutral vessel which has been captured is not to be destroyed by the captor, but must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.*

The general principle is very simple. A neutral vessel which has been seized may not be destroyed by the captor; that may be admitted by everyone, whatever view is taken as to the effect produced by the capture. The vessel must be taken into a port for the determination there as to the validity of the prize. A prize crew will or will not be put on board, according to circumstances.

ARTICLE 49.—*As an exception, a neutral vessel which has been captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the ship of war or to the success of the operations in which she is at the time engaged.*

The first condition in order that a captured vessel may be destroyed is that she should be liable to condemnation upon the facts of the case. If the captor can not even hope to obtain the condemnation of the vessel, how can he lay claim to destroy her?

The second condition is that the observance of the general principle would naturally involve danger to the warship or to the success of the operations in which she is engaged at the time. This is the regulation on which agreement was reached after various tentative propositions. It was understood that *compromettre la sécurité* was synonymous with *mettre en danger le navire*, and might be translated into English by, *involve danger*. It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled. A danger which did not exist at the actual moment of the capture may have appeared some time afterwards.

ARTICLE 50.—*Before such destruction, the persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the ship of war.*

This provision makes known the precautions to be taken in the interests of the persons and of the administration of justice.

ARTICLE 51.—*A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the capture, prove as a fact that he only acted in the face of such an exceptional necessity as is contemplated in Article 49. If he fails to do so, he is bound to indemnify the parties interested, and no investigation is to be made as to whether or not the capture was valid.*

This provision gives a guaranty against the arbitrary destruction of prizes by establishing a real responsibility of the captor who has carried out the destruction. The captor must actually, before any decision respecting the validity of the prize, prove that he was really in such an exceptional situation as was specified. This proof must be established in a manner to meet the opposition of the neutral, who, if not satisfied with the decision of the national prize court, may take his case before the international court. This proof is, therefore, a condition precedent which the captor must fulfill. If he does not do this, he must compensate those interested in the vessel and the cargo, without any investigation as to whether the capture was or was not valid. Accordingly there is a positive sanction of the obligation not to destroy a prize except in the specified cases; this sanction is a fine inflicted on the captor. If, on the other hand, this proof is established, the prize procedure follows the usual course; if the prize is declared valid, no compensation is due; if it is declared void, those interested have a right to be compensated. Resort to the international court can be had only after the decision of the prize court has been rendered on the whole matter, and not immediately after the preliminary question has been decided.

ARTICLE 52.—*If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.*

ARTICLE 53.—*If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.*

If a vessel which has been destroyed carried neutral goods not liable to condemnation, the owner of such goods has, in every case, a right to compensation; that is to say, without having to distinguish as to whether the destruction was or was not justified. This is equitable and is a further guarantee against arbitrary destruction.

ARTICLE 54.—*The captor has the right to require the delivery, or to proceed himself to the destruction of goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49 justify the destruction of a vessel liable to condemnation. The captor must enter in the log book of the vessel stopped the articles handed over or destroyed, and must procure from the master duly certified copies of all relevant papers. When the delivery, or the destruction has been effected, and the formalities complied with, the master must be allowed to continue his voyage. The provisions of articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.*

A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in article 40. The captain of the cruiser may put a prize crew on board the vessel and take her into a port for adjudication. He may, in conformity with the provisions of article 44, accept the delivery of the contraband which is offered to him by the vessel stopped. But what is to happen if neither of these solutions is reached? The vessel stopped does not offer to deliver the contraband, and the cruiser is not in a position to take the vessel into one of her ports. Is the cruiser obliged to let the neutral vessel go with the contraband on board? This has seemed excessive, at least in certain exceptional circumstances. These are in fact the same which would have justified the destruction of the vessel, if she had been liable to condemnation. In such a case the cruiser may require the delivery, or proceed to the destruction, of the goods liable to condemnation. The reasons which warrant the destruction of the vessel would justify the destruction of the contraband goods, the more so as the considerations of humanity which may be invoked in case of the destruction of a vessel do not here apply. Against an arbitrary demand by the cruiser there are the same guarantees as those which made it possible to recognize the right to destroy the vessel. The captor must, as a condition precedent, prove that he really found himself in the exceptional circumstances specified; failing this, he is penalized to the value of the goods delivered or destroyed, without investigation as to whether they were or were not contraband.

The regulation prescribes certain formalities which are necessary to establish the facts of the case and to make the prize court free to adjudicate.

Of course, when once the delivery of the goods has been effected or their destruction has taken place, and the formalities have been carried out, the vessel which has been stopped must be left free to continue her voyage. (International Law Topics, Naval War College, 1909, p. 111.)

Attitude of some commercial bodies.—The Declaration of London of February 26, 1909, has received in Great Britain very serious attention and the articles in regard to the destruction of neutral prizes have been the subject of much discussion. The chambers of commerce of Great Britain, apparently as a result of organized effort, have sent to the British Foreign Office various communications respecting the Declaration of London. To some of these communications the Foreign Secretary has replied.

The communication of the Glasgow Chamber of Commerce on August 10, 1910, so far as relates to the destruction of neutral prizes, is as follows:

> The statement of the law on this subject is satisfactory, except as regards the exception contained in article 49. This article concedes the right of a belligerent warship to destroy the prize if the taking thereof into a port would involve danger to the safety of the warship or to the success of the operations in which the captor is engaged at the time. This is a serious departure from the practice hitherto recognized. The rule which has in the past been maintained by this country is that a neutral vessel must never be destroyed. If it is impossible to bring her within the jurisdiction of a court competent to adjudicate upon her, she must be immediately released. The only exception is that, if she can be sent into a neutral port and can be allowed to lie there, this may be done. Taking the exception contained in article 49 as it stands, no prize court—national or international—would seriously challenge the discretion of the captor in reference to danger to his vessel or to the success of his operations, and the provisions of article 51 are therefore of no value.
>
> A question might no doubt be raised as to whether the neutral vessel was liable to condemnation, but this would require to be determined subsequently in a prize court or in the international court.
>
> Experience has shown the disadvantage to which neutral owners are exposed in such circumstances, and while belligerents have claimed the right to destroy prizes the right has never been regarded favorably. The effect of article 49 is, however, to recognize and approve of the right, while the safeguards, it is submitted, are illusory.
>
> Article 54 gives the captor right to destroy any goods liable to condemnation found on board a vessel not herself liable to condemnation under article 49. This is a further departure from the recognized rule and one which is of grave consequence to neutrals.

Keeping in view the enormous shipping trade of this country, it is submitted that the recognition of the rule in question would be a serious loss to British shippers and would impose upon them heavy burdens. (Correspondence respecting the Declaration of London, Parliamentary Papers, Miscellaneous, No. 4, 1910, Cd. 5418, p. 2.)

To this the Foreign Office replied on October 13, 1910:

18. Sir E. Grey is glad to find that on this subject the Chamber of Commerce regard the provisions of the Declaration of London as satisfactory, with the exception of article 49.

19. In articles 48 et sequentes, which govern the sinking of neutral vessels, very strict limitations are imposed on such action, while in all cases the onus of proof of the necessity of sinking the vessel lies on the captor. The right to sink neutral prizes has been claimed in the past by several Great Powers, and the modifications introduced by the Declaration place this country, when neutral, in a more favorable position than she has hitherto been, and, as the claim to sink neutral ships has always been opposed by Great Britain, her own rights as a belligerent are not affected, since, being *ex hypothesi*, already at war, she would not, except as a result of victory, be able to enforce her own views on her opponent. If the opponent sank a neutral merchantman the question would, in the absence of the Declaration, be dealt with by the two Governments directly concerned in accordance with their own views without any reference to the practice of Great Britain.

20. If, as the Chamber of Commerce assume, belligerents are likely to sink neutral vessels when captured, even though they may be liable to pay compensation under the Declaration, they will not refrain from doing so should the Declaration fail to be ratified.

21. The arguments which apply to the articles of the Declaration governing the destruction of neutral prizes apply equally to the destruction of goods liable to be condemned, the onus of proof falling upon the captor. (Ibid., p. 7.)

The Glasgow Chamber of Commerce sent another communication on November 14, 1910, saying:

Hitherto Great Britain has opposed the claim of a belligerent to sink neutral ships. Under article 49 of the Declaration, the right to do so is conceded to belligerents in certain circumstances. The Foreign Office apparently assumes that if the Declaration is not ratified and Great Britain is a neutral, she will submit to have the rule of international law on which she insists, viz, that neutral ships shall not be sunk but brought into port for adjudication, violated in her case, without taking steps to enforce its observance. If this is a correct interpretation of the position of

the Foreign Office, the directors of the chamber, with respect, submit that it is a policy unworthy of Great Britain.

Further, the Foreign Office, in their instructions to their delegates at the conference, pointed out with conclusive force that if there was to be any agreement on this subject, the general principle that neutral prizes are not to be destroyed must be affirmed, followed by a precise statement of the conditions on which alone a departure from the principle could be allowed in exceptional circumstances. (Blue Book, p. 28, art. 29.) The Government went on to point out cases which could not be allowed to justify destruction. (Art. 30.) The Declaration of London on this point entirely fails to define the precise cases which shall justify destruction. On the contrary, the officer who destroys the prize is left without special directions to restrain him. Here again there is room for numerous questions and distressing uncertainty.

With reference to the provisions of the Declaration, both as affecting contraband and the destruction of neutral prizes, the directors can not help again referring to the instructions, for it seems to them that the Declaration, so far as the chamber has criticised it, violates the principles there laid down. Thus it is said the Government "would find it difficult to be satisfied with any merely conventional stipulations of limited application that would leave it uncertain whether the international court might not by its decisions introduce rules and principles of naval warfare which would unduly fetter the operations of His Majesty's ships." (Ibid., p. 10.)

Reply of British Foreign Office.—To this the Foreign Office makes answer on November 26, 1910:

18. Your letter next discusses the question of the sinking of neutral prizes, and does so from the point of view of the neutral owners. The Declaration is criticised because it recognizes exceptions to the general rule that neutral prizes must be condemned in a prize court before they can be destroyed by the captor. As has already been pointed out, most of the naval Powers claim that the right to sink without previous adjudication is in conformity with the existing law of nations. Your directors consider that it would be unworthy of Great Britain not to insure by force the observance of the British view of the law of nations. Resort to war is of course the ultimate means of enforcing compliance with national demands, but it will be in the recollection of your directors that in 1904, when the belligerent claim to such treatment of neutral prizes was put into force for the first time, it was not thought desirable, in the higher inerests of the country, to go to war. The action of Great Britain was then confined to diplomatic protest, and it would on future occasions be all the more difficult for her to justify an appeal to force in support of views which are not held by the majority of the powers. His

Majesty's Government have, therefore, been anxious to find a less violent and less costly method of solving the difficulty arising out of the conflicting interpretations of international law, if they could do so without material injury to the interests of the country and of British shipowners. They had, furthermore, to consider that in a war in which Great Britain was herself a belligerent, a powerful enemy claiming the right to sink would undoubtedly exercise that right without Great Britain being in a position to prevent this otherwise than by prosecuting the war in which she was already engaged; whilst resistance on the part of the neutrals was not to be counted upon so long as they themselves recognized the right.

19. For British vessels whilst neutral, the endeavor of His Majesty's Government has been to secure conditions offering reliable safeguards that destruction prior to adjudication shall not take place save in exceptional emergencies, and then only if a vessel is captured in circumstances that would render her liable to condemnation in a prize court. The strict fulfilment of such conditions would obviously be an absolute guaranty that the captor would in effect but destroy his own property. Supposing the right of destruction to have been thus narrowly circumscribed, it would remain to provide an effective remedy in the case of any abuse or mistake on the part of the captor. The appropriate remedy would consist in the neutral owner being fully indemnified for any loss or injury illegitimately inflicted upon him in such circumstances.

20. The Declaration consists of a series of provisions designed to attain these objects, which need not again be quoted at length. They were fully explained and commented upon in the report of the British Delegates at the Naval Conference of the 1st March, 1909, which is included in the Blue Book (p. 98). Your letter asserts that the Declaration "entirely fails to define the precise cases which justify destruction." This is an error. The cases are expressly stated to be those, and those only, in which the ship is liable to condemnation, and these are enumerated and clearly defined in articles 40 and 46, under the heads of contraband and unneutral service. If the remark was meant to refer to the fact that the Declaration does not specifically define the circumstances of "exceptional necessity," which constitute danger to the safety of the captor's ship or to the success of the operations in which she is at the moment engaged, your directors will see, on reference to section 25 of the Delegates' Report, that the alternative of introducing a more precise definition of such circumstances was after careful consideration discarded because it was seen to be impossible to enumerate them exhaustively and because any incomplete enumeration would be more harmful in its practical effects than a well-framed general rule standing alone. (Ibid., p. 14.)

In reply to a letter of the Leith Shipowners' Society, saying that the destruction of neutral prizes at sea would be "liable to serious abuse," the Foreign Office, on November 4, 1910, says:

4. The second question raised in your letter is that of the destruction of neutral vessels prior to adjudication in a prize court. You contend that such a practice is liable to serious abuse, even under the most carefully worded conditions. It is, however, important primarily to consider what would be the position if the Declaration of London were not to come in force. Your society can not be unaware that the sinking of neutral vessels having contraband on board has been asserted by most of the naval Powers to be in entire accordance with the existing law of nations. Nor have those Powers hitherto admitted that such right is limited by any of the serious restrictions which are now imposed under the Declaration, and to which, in fact, they have only been induced to agree as specific concessions to the view upheld by this country. Combined with the establishment of an international court of appeal in matters of prize, those concessions constitute a very effective safeguard against any abuse of the power to sink neutral vessels which belligerents have up to now claimed to exercise without any restraints.

5. Nonratification of the Declaration would necessarily involve the abandonment both of the concessions obtained thereunder and of the whole scheme of an international prize court, with this result, among others, that neutrals would, as heretofore, have no other remedy than a recourse to force against a belligerent whose national prize courts recognized the practically unrestricted right to sink neutral vessels carrying contraband as being well established in international law. Even, therefore, if it were, for the sake of argument, admitted that the safeguards provided by the Declaration were not so completely adequate as to prevent any possible abuse, it is a fact not open to controversy that, such as they are, they represent a material and beneficial advance on a state of things which left belligerents practically free to act without any of the stipulated restrictions. (Ibid., p. 17.)

There has been much activity shown by many commercial bodies and some of the resolutions adopted and communications sent to the Foreign Office show that the present laws, as well as the articles of the Declaration of London, are not understood by those who may lose most because good laws do not exist or gain most if good laws are adopted.

Discussion in Parliament.—The discussions in Parliament relating to the Declaration of London have been under the title of the Naval Prize Bill. The British Government promised that the Declaration of London should not be ratified until Parliament should have opportunity to discuss its provisions, though constitutionally the consent of Parliament is not necessary for ratification. The self-governing colonies were also given opportunity to discuss the provisions of the Declaration.

The lord chancellor in a speech in the House of Lords, upon the motion to appoint a Royal Commission to report on the advisability of agreeing to the terms of the Declaration of London, said on March 9, 1911:

> I pass now to the subject of neutral prizes. All nations assert the right to destroy neutral prizes if they find they can not take them into port except Great Britain, Japan, Spain, and Holland. That is the law they would apply in their prize courts if you reject this Declaration. Even the record of Great Britain is not quite clear upon this subject of the destruction of neutral ships. The Declaration allows it subject to distinct conditions. A ship may be destroyed if the observance of article 48—that means taking her into port for adjudication—will involve danger to the warship or to the success of the operation in which she is engaged at the time. Suppose we reject this Declaration. Our enemy would destroy neutral prizes at discretion without any limitation at all, acting upon their own laws. But suppose we are neutrals and our merchant ships are destroyed. This actually happened, as we know, in the Russo-Japanese War. We were then put to the choice either of allowing the incident to pass uncompensated or to have recourse to war with Russia. Of course, the late Government, like sensible men, never thought of making that the subject of a declaration of war.
>
> If that happened again, after the Declaration had been ratified, Russia would have to submit to the International Court and to pay compensation if she was found to be wrong. (Daily Telegraph, Mar. 10, 1910.)

Lord Salisbury, favoring the motion for a Royal Commission, said on March 13:

> As matters stood without the Convention, if there were an attempt on the part of a belligerent to capture or destroy all ships carrying foodstuffs to our ports as contraband, there would at once be an uprising on the part of neutral powers.

As a matter of fact, the belligerent would be effectively controlled by the public opinion of the neutral powers. During the South African War there was a certain amount of friction between this country and Germany, and the protest of the German Government had immense weight with the British Government at that time; the protest that we were interpreting international law harshly was most effective, and had to be taken into account by us. If this Convention were not passed, he was perfectly certain that neutral Powers would not submit to a belligerent interpreting his powers harshly. If the Convention were ratified, when an enemy began to capture and destroy ships carrying foodstuffs, and if there were a protest the enemy would say: "It is all right. You can go to the tribunal when the war is over and get compensation. You can not protest, as you are not damaged. You can not take the law into your own hands. It is not for you to say what is a base of supply. That is for the international court when the war is over."

That was the essential point, and that was why this Convention was so dangerous. Under the convention a belligerent could go on destroying ships with foodstuffs, and when the war was over he would not care much whether or not he had to pay compensation.

After quite full discussion of various phases of the Declaration the motion for a Royal Commission was withdrawn on March 13, 1911.

Some who favor the abolition of all laws for war upon the sea so far as concerns Great Britain have made strong speeches against the Declaration, others have seen only good points, while some have realized that there was no unity in the laws and practices of nations and that the Declaration would substitute in a large degree certainty for uncertainty and confusion likely to lead to international friction and to stir up sentiments favorable to the spread of war.

Letters to the London Times.—Mr. Thomas Gibson Bowles has maintained both in the House of Commons and outside a very active opposition to reforms in naval prize law and to the Declaration of London. His book, Sea Law and Sea Power, is in general opposed to all international agreements in regard to maritime warfare from the Declaration of Paris of 1856 to the Declaration of London of 1909, and including the conventions of the Hague Conferences of 1899 and 1907. In a letter to the London Times he says:

To the EDITOR OF THE TIMES.

SIR: In your review of my book, Sea Law and Sea Power, is this passage: "We know what Mr. Bowles dislikes. What exactly does he want, and what does he think at the present time practicable?"

I thought I had made clear what I want; but since it is not so I would ask permission to say that what exactly I want is that the Naval Prize Bill shall be withdrawn; or, failing this, that it shall be rejected.

What I think at the present time practicable is to leave things as they are, without making those changes in sea law which the Declaration of London would effect, and especially without accepting that subjection which the Hague convention would achieve, to such a foreign tribunal as is proposed, of our own ancient and honored courts.

With that, at this time, I for one should be content. But if the law of nations is to be recast and the courts that administer it to be superseded, then I hold that the "rash and unwise proceeding," as Lord Salisbury called it, of the Declaration of Paris must also be reconsidered, and the question revived of its denunciation.

But what I want most of all is that these novel and most grave proposals shall be duly and deliberately considered and decided upon by Parliament before the country is committed to any new obligations whatever. If that is attained, the purpose of my book will have been achieved.

Your faithful servant,

THOS. GIBSON BOWLES.

24 LOWNDES SQUARE, SW.
November 17.

Other letters to the Times vary in character. Some are apparently prompted by party prejudices rather than based upon knowledge of the law or of the provisions of the Declaration of London. Letters of Mr. Arthur Cohen, Prof. T. E. Holland, Prof. J. Westlake, and men of like standing are such as show sober British judgment.

In a letter bearing the date of February 1, 1911, Prof. Westlake particularly speaks of the destruction of neutral prizes, saying:

To the EDITOR OF THE TIMES.

SIR: Having discussed the topics on which the Naval Conference of London was unable to reach an agreement, I come to the agreement comprised in the 71 articles and the report. It will be well to take first a topic with which, if it was not to be

another eliminated one, it was not possible to deal otherwise than as the Declaration does. This is the destruction of neutral prizes at sea. If the cause of the *Knight Commander* and the others which occurred during the Russo-Japanese War have inflamed British opinion against such destruction, they have also proved our inability to prevent it without going to war whenever a British neutral prize is sunk, an heroic remedy when we consider that the practice is allowed by the regulations of France, the United States, and Japan, as well as of Russia, and that the Institute of International Law has declined to condemn it. The Declaration has done what was possible for the view claimed as the British one, by a reasonable limitation of the practice and the provision of indemnity in case the limits laid down are transgressed. No doubt article 49 leaves it open that the inability to spare a prize crew may be held a justification; but the British Admiralty Manual of 1888 expressly allowed that justification for sinking an enemy prize, even with neutral goods on board, between which case and that of sinking a neutral prize the distinction in principle is the very point in dispute.

After considering other important articles of the Declaration, he further says:

The remaining portions of the Declaration are scarcely important enough to weigh much with any one in favor of its rejection and are highly technical. To what give and take may be found in them, or in the articles which have been selected for notice, there applies the general remark that not only is it fairly balanced, but that it has the great merit of securing to England the enjoyment of the rights in which the Declaration confirms her. Those who would reject that benefit or even, like Mr. Rowles, return to an earlier state of things by undoing the Declaration of Paris, are usually ignorant how groundless was the claim to treat all British pretensions as recognized international law. Now, too, the multiplication of great sea Powers necessarily leads to the consequence that any flaw in our claims—whether arising from their never having been acknowledged law or from the change of circumstances to which all international law, however acknowledged at some time, is bound to adjust itself—will be pressed against us with a force very different from that which we had to meet when the neutrals were generally smaller Powers. A rare opportunity is offered us. On our belligerent rights against an enemy we must stand firm, and we are not asked to forego them. In questions between belligerents and neutrals whatever can be described as vital has not been made the subject of compromise, but stands outside the Declaration of London, and, as I have shown, can be saved by the necessary reservations from prejudicing us either in an International Prize Court or in diplomacy. Regret that even on those points there has not been

agreement must not prevent our accepting the agreement arrived at, which gives us the benefit of assured law on so wide a field and of being relieved by an International Prize Court from the odium of being the final judges in our own case.

Naval opinion in Great Britain.—In the House of Commons on February 14, 1911, certain questions were asked of Mr. McKenna, the First Lord of the Admiralty:

Mr. Lee asked the First Lord of the Admiralty whether the provisions of the Declaration of London had been submitted to and considered by the Board of Admiralty, with special reference to naval interests and the protection of British commerce, and whether the Board had signified its approval of the Declaration.

Mr. McKENNA. The Admiralty were represented at the International Naval Conference which led up to the Declaration of London. Its provisions were submitted to and considered by the Admiralty, and there was no occasion for the Board to signify their approval in a formal manner.

Mr. LEE. In view of the fact that the Board of Admiralty has not signified its approval of the Declaration, will the Government undertake that the Declaration will not be ratified until the Admiralty has declared itself satisfied that the naval interests of this country will be safeguarded?

Mr. McKENNA. The honorable member must not assume from my reply that, because the Board did not signify its approval in a formal manner, the Board did not approve.

Mr. LEE. Then it has approved?

Mr. McKENNA. Yes, sir. No. Let me explain. It is an extremely important question. The Admiralty being represented at the conference, there was no formal meeting of the Board of Admiralty, and consequently no formal approval was ever expressed by the Board, but approval has been given, and the assent of individual members must be supposed.

Mr. LEE. Was the representative at the Conference a member of the Board of Admiralty?

Mr. McKENNA. No; he was the Director of Naval Intelligence, and, representing the Admiralty, put forward the Admiralty's views at the Conference. His action was approved by the Board, and, therefore, that must be accepted as the approval of the Conference.

Admiral Sir Algernon de Horsey is reported to have said:

The Declaration of London is well calculated to destroy the British Empire in case of war. It is inconceivable how the British delegate could sign it. (London Daily Mail, Jan. 23, 1911.)

Admiral Sir Cyprian Bridge, in a letter to the Nation on January 28, 1911, says:

Much of the agitation against the Declaration of London is based on the pernicious belief that when we are forced into a war we shall achieve success by standing on the defensive. In a naval war, the only kind of war which will ever be serious for us, we shall have one objective, and one only, viz, the enemy's navy. We shall have to seek for that and attack it wherever we can get at it. This is the method to be adopted to keep the enemy so fully employed in defending himself that he will be unable to infest our ocean routes and, consequently, will be unable to capture or detain our own or friendly ships traversing those routes, or to send any considerable military expedition toward the shores of the United Kingdom and of any of our oversea territories.

In reply to a question in the House of Lords on March 8, 1911, Viscount Morley said:

In general terms I may say that the opinion of the Admiralty is that, in existing circumstances, the effect of the establishment of an International Court of Appeal and of the Declaration of London on this country as a belligerent in the conduct of naval operations would be small and inconsiderable. (The London Times, Mar. 9, 1911, p. 6.)

Mr. Bentwich's review of opinions.—Mr. Norman Bentwich in a book entitled, "The Declaration of London," considers quite fully the various contentions in regard to the destruction of neutral vessels and says:

The Articles of the Declaration, though they are not as deterrent as might have been desired, are at least calculated to secure more respect for the neutral, and to place a larger measure of responsibility on the belligerent than was witnessed in the American Civil and the Russo-Japanese Wars. Of course there is no reason why Great Britain should depart from her present custom of not sinking neutral prizes, save in very exceptional circumstances; and our abundance of ports in every ocean makes it more feasible for our cruisers than for those of other nations to bring their prizes in for adjudication. We are thus enabled to gain by adding the captured vessels to our marine and confiscating their cargo; and with the new limitation on the right to destroy, our traders will be able to secure compensation in any case where their captured vessels would not have been liable to condemnation if they had been brought in for adjudication instead of being destroyed. The outcry against destruction of prizes is largely founded upon the fact that neutral vessels have been sunk by

their captors, which should not by the law of nations have been condemned at all. Now, the circumstances in which a neutral vessel is liable to condemnation are quite clearly laid down by the Declaration; and the obligation of the belligerent to pay full compensation to the neutral shipowner and cargo owner where a prize is sunk which is not legally liable to condemnation, and lastly, the power which the neutral will have, if the Declaration and the Prize Court Convention are ratified, of taking the question of the validity of the destruction to an International Tribunal which will have no prejudice in favor of the belligerent, form together a combination of safeguards which should prevent outrages upon neutral commerce such as the Russo-Japanese War produced, and should make the right of sinking prizes in future wars exceptional in fact as well as in theory (p. 98).

Application of Declaration of London to Situation III.—It is evident that the British merchant vessel would not be liable to condemnation because of the carriage of certain articles of contraband unless the amount was more than one-half by value, weight, volume, or freight (Art. 40) or unless the vessel were otherwise guilty, which is not implied in the situation.

ART. 49. As an exception, a neutral vessel which has been captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of article 48 would involve danger to the ship of war or to the success of the operations in which she is at the time engaged.

Article 49 of the Declaration of London, which as an exception says a neutral vessel may be destroyed, would not apply, and the commander of the United States fleet would not be justified in destroying the vessel on account of the amount of contraband on board.

The destruction of the British merchant vessel is not necessary on the ground that it would "involve danger to the ship of war."

The question as to whether the entrance of the British merchant vessel into a port of State X would involve danger "to the success of operations in which the belligerent ship of war is at the time engaged" may be raised. Certainly a case might arise in which the information prematurely given by a neutral merchantman that a belligerent fleet had been met would defeat the

plans of the fleet. The propriety of destruction, if otherwise legal, would in such case depend upon the proper interpretation of the clause of article 49, "the operations in which she is at the time engaged." The interpretation of this clause, as set forth in the General Report of the International Naval Conference, is:

> It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled. A danger which did not exist at the actual moment of the capture may have appeared sometime afterwards.

The United States fleet is sailing to make an attack upon a fortified port of State X, but it is not engaged in this attack, indeed it may never make the attack. It may be met by a fleet of State X and may be driven away. It may receive orders to take other action. The war may come to an end before it reaches State X. Many other possible circumstances may arise which will make the contemplated attack upon the fortified port of State X impossible or unnecessary. The situation is not therefore such as to justify the destruction of the British merchantman on the ground that her preservation endangers the "success of the operations in which the belligerent vessel is at the time engaged."

Article 54 gives the commander of the United States fleet certain rights as regards the contraband on board, provided the military necessity is such as contemplated in article 49.

> ART. 54. The captor has the right to require the delivery, or to proceed himself to the destruction of goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as, under Article 49, justify the destruction of a vessel liable to condemnation. The captor must enter, in the log book of the vessel stopped, the articles handed over or destroyed and must procure from the master duly certified copies of all relevant papers. When the delivery, or the destruction has been effected, and the formalities complied with, the master must be allowed to continue his voyage.
>
> The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

It is generally regarded as justifiable for a commander to assume such control as may be necessary over wireless telegraph apparatus within the zone of actual operations, though as wireless is now regarded as a necessary part of a vessel's equipment, this apparatus should in general not be destroyed. The commander of the fleet can therefore take necessary measures to make certain that the neutral vessel will not use the wireless equipment in an unneutral manner which would endanger the success of his military operations.

SOLUTION.

The protest of the British master against the destruction of his vessel is correct.

The commander of the United States fleet may, if military necessity or treaty provision justifies, take or destroy the contraband on board the merchant vessel, and he may take measures to assure himself that the wireless apparatus will not be put to unneutral use.

SITUATION IV.

DELIVERY OF CONTRABAND AT SEA.

(It is granted in this situation that the Declaration of London is binding.)

There is war between the United States and State X. Great Britain is neutral. A British vessel, having on board articles of the nature of absolute contraband and bound for a port of State X, is met at sea by a United States cruiser. It is evident from the date of sailing and from the vessel's papers that she did not know of the outbreak of hostilities. The commander of the cruiser is remote from a prize court and does not wish to take the merchant vessel in. He requests her master to deliver the contraband. The master declines.

What should the commander of the cruiser do?

SOLUTION.

In absence of exceptional necessity, and if the contraband is not voluntarily delivered, the commander of the cruiser should either send to a prize court or else release the neutral vessel.

NOTES.

Treaty provisions on delivery of contraband.—One of the earliest treaties providing for the delivery of contraband by a neutral master to a visiting belligerent is that of February 7/17, 1667/8, between Great Britain and the States-General of the United Netherlands.

XIV. If it should happen that any of the said French captains should make prize of a vessel laden with contraband goods, as hath been said, the said captains may not open nor break up the chests, mails, packs, bags, cask, or sell, or exchange, or otherwise alienate them, until they have landed them in the presence of the judges or officers of the Admiralty, and after an inventory by them made of the said goods found in the said vessels; unless the contraband goods making but a part of the lading, the master of the ship should be content to deliver the said contraband goods

unto the said captain, and to pursue his voyage; in which case the said master shall by no means be hindered from continuing his course and the design of his voyage. (1 Chalmers Collection of Treaties, vol. 1, p. 167.)

The treaty with France of February 4, 1676–77, Article VII, stated:

If the vessel is laden but in part with contraband goods, and the master thereof offers to put them in the captor's hands, the captor shall not then oblige him to go into any port, but shall suffer him to continue his voyage.

The words " agree, consent, and offer to deliver them to the captor " is the form used in some of the later treaties.

Similar provision appears in treaties between European States during the late seventeenth and during the eighteenth centuries. Article 26 of the treaty of Utrecht between Great Britain and France, 1713, is an example of the prevalence of this form of international agreement.

A provision in regard to the delivery of contraband by a neutral vessel in the treaty of 1782 between Russia and Denmark reads:

ART. XX. Que si par contre un navire visité se trouvoit surpris en contrebande, l'on ne pourra point pour cela rompre les caisses, coffres, balles & tonneaux qui se trouveront sur le même navire, ni détourner la moindre partie des marchandises; mais le capteur séra en droit d'amener le dit navire dans un port, où après l'instruction du procès faite par devant les juges de l'amirauté selon les règles & loix établies, & après que la sentence définitive aura été portée, la marchandise non-permise, ou reconnue pour contrebande, sera confisquée, tandis que les autres effets & marchandises, s'il s'en trouvoit sur le même navire, seront rendus, sans que l'on puisse jamais retenir ni vaisseau, ni effets, sous prétexte de frais ou d'amende. Pendant la durée du procès le Capitaine, après avoir délivré la marchandise reconnue pour contrebande, ne sera point obligé malgré lui, d'attendre la fin de son affaire; mais il pourra se mettre en mer avec son vaisseau & le reste de sa cargaison, quand bon lui semblera, & au cas qu'un navire marchand de l'une des deux Puissances en paix fût saisi en pleine mer, par un vaisseau de guerre, ou armateur, de celle qui est en guerre, & qu'il se trouvât chargé d'une marchandise reconnue pour contrebande, il sera libre au dit navire marchand, s'il le juge à propos, d'abandonner d'abord la dite contrebande à son capteur, lequel devra se contenter de cet abandon volontaire, sans pouvoir retenir, molester ou inquiéter en aucune façon le

navire, ni l'équipage, qui pourra dès ce moment poursuivre sa route en toute liberté. (De Martens, Recueil des Principaux Traités d'Alliance, etc., Tome II, 1779–1786, inclusive, p. 292.)

Russia also made similar treaties with Austria in 1873; with France in 1787; with the Two Sicilies and with Portugal in the same year; and with Sweden in 1801. Other European powers have made a few such agreements.

Orders to commanders and domestic regulations of much earlier date than 1782 allow a form of surrender of contraband by neutral masters and its acceptance by belligerent commanders.

Treaties of the United States.—The United States early made treaty agreements in regard to the handing over of contraband by a neutral vessel. One of the earliest of such treaties was negotiated with Sweden in 1783 and is still in force. The "certificates" mentioned in the treaty are ships' papers which contain—

a particular account of the cargo, the place from which the vessel sailed, and that of her destination . . . which certificates shall be made out by the officers of the place from which the vessel shall depart.

Article 13 of the treaty with Sweden referring to the handing over of contraband is as follows:

If on producing the said certificates it be discovered that the vessel carries some of the goods which are declared to be prohibited or contraband and which are consigned to an enemy's port, it shall not, however, be lawful to break up the hatches of such ships nor to open any chest, coffers, packs, casks, or vessels, nor to remove or displace the smallest part of the merchandises until the cargo has been landed in the presence of officers appointed for the purpose and until an inventory thereof has been taken; nor shall it be lawful to sell, exchange, or alienate the cargo or any part thereof until legal process shall have been had against the prohibited merchandises, and sentence shall have passed declaring them liable to confiscation, saving, nevertheless, as well the ships themselves as the other merchandises which shall have been found therein, which by virtue of this present treaty are to be esteemed free, and which are not to be detained on pretense of their having been loaded with prohibited merchandise and much less confiscated as lawful prize. And in case the contraband merchandise be only a part of the cargo, and the master of the vessel agrees, consents, and offers to deliver them to

the vessel that has discovered them, in that case the latter, after receiving the merchandises which are good prize, shall immediately let the vessel go and shall not by any means hinder her from pursuing her voyage to the place of her destination. When a vessel is taken and brought into any of the ports of the contracting parties, if upon examination she be found to be loaded only with merchandises declared to be free, the owner, or he who has made the prize, shall be bound to pay all costs and damages to the master of the vessel unjustly detained. (Treaties and Conventions, 1776–1909, vol. 2, p. 1729.)

The treaty of the United States with Prussia of 1799, which is regarded as still operative, has a provision relating to the delivery of contraband, but the wording is somewhat different from that of the Swedish treaty. Article XIII of the Prussian treaty reads:

And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles, carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors, and it shall further be allowed to use in the service of the captors, the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

All cannons, mortars, firearms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger, ought to have, and, in general, whatever is comprised under the denomination of arms and military stores, or what description so ever, shall be deemed objects of contraband. (Ibid., p. 1491.)

The treaty of 1828 between the United States and Brazil has a somewhat different statement from that of earlier treaties.

ART. 18. The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper. No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they can not be received on board the capturing ship without great inconvenience; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and safe port, for trial and judgment, according to law. (Ibid., vol. 1, p. 139.)

Article 19 of the treaty of 1846 between the United States and Colombia (ibid., p. 308) is identical with article 18 of the Brazilian treaty above mentioned.

The same may be said of Article 19 of the Bolivian treaty of 1858. (Ibid., p. 119.)

The treaty between the United States and Haiti of 1864, terminated in 1905, provided for the acceptance of the evidence of certificates and for delivery of contraband under certain restrictions.

ART. 23. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the contracting parties, it is hereby agreed that when one party shall be engaged in war and the other party shall be neutral the vessels of the neutral party shall be furnished with passports, that it may appear thereby that they really belong to citizens of the neutral party. These passports shall be valid for any number of voyages, but shall be renewed every year.

If the vessels are laden, in addition to the passports above named, they shall be provided with certificates, in due form, made out by the officers of the place whence they sailed, so that it may be known whether they carry any contraband goods. And if it shall not appear from the said certificates that there are contraband goods on board, the vessels shall be permitted to proceed on their voyage. If it shall appear from the certificates that there are contraband goods on board any such vessel, and the

commander of the same shall offer to deliver them up, that offer shall be accepted, and a receipt for the same shall be given, and the vessel shall be at liberty to pursue her voyage unless the quantity of contraband goods be greater than can be conveniently received on board the ship of war or privateer, in which case, as in all other cases of just detention, the vessel shall be carried to the nearest safe and convenient port for the delivery of the same.

In case any vessel shall not be furnished with such passport or certificates as are above required for the same, such case may be examined by a proper judge or tribunal; and if it shall appear from other documents or proofs, admissible by the usage of nations, that the vessel belongs to citizens or subjects of the neutral party, it shall not be confiscated, but shall be released with her cargo (contraband goods excepted) and be permitted to proceed on her voyage. (Ibid., p. 927.)

The United States has had similar provisions in treaties with France, 1800; with Central America, 1825; with Mexico, 1831; with Venezuela, 1836; with Peru, 1836; with Ecuador, 1839; and with San Salvador, 1850.

A late treaty containing a provision in regard to delivery of contraband was that of March 9, 1874, between the Argentine Republic and Peru:

XXIII. No vessel of either of the contracting parties shall be detained on the high seas for having articles of contraband on board, provided always the captain or supercargo of the said vessel deliver the articles of contraband to the captor, unless these articles should be numerous or of such great bulk that they can not, without serious inconvenience, be received on board the captor's vessel; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and secure port, to be there judged agreeably with the laws. (British and Foreign State Papers, vol. 69, p. 706.)

British rule.—The British Manual of Naval Prize Law of 1866 provided:

186. The commander will not be justified in taking out of a vessel any contraband goods he may have found on board, and then allowing the vessel to proceed; his duty is to detain the vessel, and send her in for adjudication, together with the contraband goods on board.

This clause appears in the manual prepared by Prof. Holland and issued by authority of the Lords Commissioners of the Admiralty in 1888 as No. 81.

American Navy Department order, 1898.—General Order 492 of the Navy Department of June 20, 1898, says:

The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

Opinions of text writers.—There is much to be said against the practice by which officers whose functions are primarily executive are intrusted with functions which are in a measure judicial. In general, contraband should pass before a prize court. It is for the naval officer to make the capture, but for the court to determine its propriety and disposition.

Kleen says of confiscation without adjudication by a prize court:

Il n'est guère besoin de relever combien cet usage est peu compatible avec un bon règlement des prises. Sans doute, tout propriétaire particulier est libre de livrer, s'il le veut, sa propriété, même légale, à un belligérant ou à ses organes militaires, en supportant volontairement la perte; et s'il le fait, soit par crainte, indifférence ou insouciance, personne n'a qualité pour s'en plaindre. Mais une renonciation semblable à la protection de la loi ne saurait dans aucune hypothèse lui être imposée comme *devoir*. Aucun patron d'un navire neutre n'a le droit de livrer ainsi la propriété de son armateur sans le consentement de celui-ci, en s'autorisant d'un usage inique; et aucun croiseur n'a le droit de s'en emparer sans procédure qui prouve sa propre compétence et l'illégalité de l'objet. D'autre part, le propriétaire peut s'en rapporter au droit international pour protester contre toute confiscation qui se fait sans jugement régulier. Quant aux frais et aux retards qu'occasionnent les formalités juridiques, ils seront à la charge du contrevenant qui en est la cause, à savoir du neutre qui aurait rompu sa neutralité, ou bien du capteur qui aurait effectué une saisie injuste ou légère.

Afin de régler ces questions à l'amiable, plusieurs États ont conclu, surtout vers la fin du XVIII[e] siècle, des traités par lesquels les contractants se sont mutuellement concédé le droit de confisquer, en cas de guerre, la contrebande sur simple délivraison, sans procédure. Il est évident que ces actes conventionnels sont autant de preuves que la confiscation purement exécutive manque de fondement dans le droit international, puisqu' autrement il eût été superflu de s'en réserver le droit par traité spécial. Un

tel traité est naturellement valide, mais il ne lie que ses parties. Un État qui ne s'est pas ainsi obligé, n'a pas besoin de tolérer que des confiscations non judiciaires aient lieu sous son pavillon par des belligérants. (La Neutralité, vol. 1, p. 450.)

Dana, in a note to Wheaton, states his opinion as follows:

Taking contraband goods out of neutral vessels.—It is for the interest of the neutral carrier, if he knows that the goods claimed by the visiting cruiser are contraband, to give them up and be permitted to go on his way, rather than to be carried into the belligerent's port to await adjudication upon them. In the seventeenth article of the treaty of 1800 between the United States and France, which expired in 1808, there is a provision that if the vessel boarded shall have contraband goods and shall be willing to surrender them to the cruiser she shall be permitted to pursue her voyage, unless the cruiser is unable to take them on board, in which case the vessel shall accompany her to port. This stipulation is common in the treaties between the United States and the other American Republics. Hautefeuille contends for this as a right of a neutral by international law; by which, however, he means that it should be the neutral's right, by justice and reason, in the author's opinion. No national act in diplomacy, or based on adjudication, and independent of treaty, has been produced or suggested by the distinguished author in affirmance of such a right. It is to be observed that as the captor must still take the cargo into port and submit it to adjudication, and as the neutral carrier can not bind the owner of the supposed contraband cargo not to claim it in court, the captor is entitled, for his protection, to the usual evidence of the ship's papers, and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all these papers and deliver them to the captor, and certainly the testimony of the persons on board can not be taken at sea in the manner required by law. Such a provision may be applicable to a case where the owner of the goods, or a person capable of binding him, is on board and assents to the arrangement, agreeing not to claim the goods in court, but not to a case where the owner is not bound. There may also be a doubt whether the ostensible owner or agent is really such, and so the captor may be misled. Indeed, a strong argument might be made from these considerations that the article in the treaty can only be applied to a case where there is the capacity in the neutral vessel to insure the captor against a claim on the goods. (Wheaton, International Law, Dana ed., p. 665*n*.)

Naval Conference of 1908–9.—The Austro-Hungarian proposition before the International Naval Conference in 1908 was as follows:

On pourrait déclarer, par exemple, d'une part, qu'il sera loisible au capitaine du navire neutre de livrer sur-le-champ la contrebande ou de la détruire, si, par là, il peut échapper à la saisie et, par conséquent, à la destruction de son bâtiment, d'autre part, que le capteur sera obligé de prendre possession des marchandises ou d'en permettre la destruction si, en laissant le navire neutre continuer sa route avec la contrebande à bord, il compromettrait sa propre sécurité ou le succès de ses opérations.

De pareils préceptes pourraient être, de même, établis quant aux matières du droit de prise.

Il est clair que la formule n'en pourrait être trouvée que lorsqu'un accord se sera produit sur les principes du régime, auquel les prises neutres devront être soumises. (British Parliamentary Papers, Miscellaneous, No. 5. International Naval Conference, 1909, p. 100.)

Report of British Delegation.—The report of the British Delegation to Sir Edward Gray:

18. Careful consideration was given to the question, raised in paragraph 33 of our instructions, whether any satisfactory arrangement could be devised for allowing the immediate removal by the captor of any contraband found on board a neutral vessel. Proposals were put forward by several delegations. The most far-reaching one was one submitted by Austria-Hungary, under which the neutral vessel carrying contraband was to be given the right to proceed on her way without further molestation if the master was ready to hand over the contraband to the captor on the spot, a proviso being added which made it necessary that the subsequent decision of a prize court should intervene in order either to validate the transaction or to decree compensation where the captor should have been proved to have acted wrongfully. In this form, the proposal did not meet with general support. It was objected that to concede an absolute right in the terms to the neutral would constitute an unjustifiable interference with the legitimate rights of belligerents, and that, moreover, the rule would be found in practice unworkable. The Conference therefore fell back upon the clause now embodied in the Declaration as article 44, which goes no further than authorizing the handing over of contraband, or its destruction, on the spot, by common agreement between captor and neutral, subject to the subsequent reference of the case to the prize court. It is not anticipated that it will be possible to apply this rule in very numerous instances,

as, under modern conditions of maritime commerce, the transshipment or destruction of cargo on the high seas is likely in most cases to present serious or insuperable difficulties. But, so far as it goes, the rule may afford a welcome measure of relief in favorable circumstances. (Parliamentry Papers, Miscellaneous, No. 4, 1909, International Naval Conference, p. 97.)

Application of Declaration of London.—The fact that the British merchant vessel did not know of the outbreak of hostilities is covered by Article 43 of the Declaration of London.

ART. 43. If a vessel is met with at sea unaware of a state of war, or of a declaration of contraband affecting her cargo, the contraband is not to be condemned, except on payment of compensation; the vessel herself and the remainder of the cargo are exempt from condemnation and from the payment of the expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the opening of hostilities or of the declaration of contraband, has not yet been able to discharge the contraband.

The General Report, London Naval Conference, in reference to this article, states:

This provision has for its aim to protect neutrals who might, in fact, be carrying contraband, but against whom no charge could be made, which may happen in two cases. The first is that in which they do not know of the opening of hostilities; the second is that in which, though they know of this, they do not know of the declaration of the contraband a belligerent has made, in accordance with articles 23 and 25, and which is properly applicable to the whole or a part of the cargo. It would be unjust to capture the ship and condemn the contraband; on the other hand, the cruiser can not be bound to permit to go on to the enemy goods suitable for use in the war and of which he may be in urgent need. These opposing interests are reconciled in the sense that the condemnation may take place only in payment of compensation. (See for a similar idea the convention of the 18th of October, 1907, in the rules for enemy merchant vessels in the outbreak of hostilities.)

The procedure, as outlined by the Declaration of London, 1909, Article 54, would apply only in case of exceptional necessity. This article says:

The captor has the right to require the delivery, or to proceed himself to the destruction of, goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that

the circumstances are such as would, under article 49, justify the destruction of a vessel liable to condemnation. The captor must enter in the log book of the vessel stopped the articles handed over or destroyed, and must procure from the master duly certified copies of all relevant papers. When the delivery, or the destruction, has been effected, and the formalities complied with, the master must be allowed to continue his voyage.

The provisions of articles 51 and 52, respecting the obligations of a captor who has destroyed a neutral vessel, are applicable.

The General Report of the Conference further explains Article 54:

A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in article 40. The captain of the cruiser may put a prize crew on board the vessel and take her into a port for adjudication. He may, in conformity with the provisions of article 44, accept the delivery of the contraband which is offered to him by the vessel stopped. But what is to happen if neither of these solutions are reached? The vessel stopped does not offer to deliver the contraband and the cruiser is not in a position to take the vessel into one of her ports. Is the cruiser obliged to let the neutral vessel go with the contraband on board? This has seemed excessive, at least in certain exceptional circumstances. These are in fact the same which would have justified the destruction of the vessel if she had been liable to condemnation. In such a case the cruiser may require the delivery or proceed to the destruction of the goods liable to condemnation. The reasons which warrant the destruction of the vessel would justify the destruction of the contraband goods, the more so is the considerations of humanity which may be invoked in case of a vessel do not here apply. Against an arbitrary demand by the cruiser there are the same guaranties as those which made it possible to recognize the right to destroy the vessel. The captor must, as a condition precedent, prove that he really found himself in the exceptional circumstances specified; failing this, he is penalized to the value of the goods delivered or destroyed, instant investigation as to whether they were or were not contraband.

Résumé.—The goods upon the neutral British vessel are of the nature of absolute contraband.

The vessel is evidently ignorant of the existence of hostilities. The contraband could not be condemned except with the payment of indemnity. There is no doubt that the articles of the nature of absolute contraband could be condemned on payment of indemnity.

In accordance with Article 54 of the Declaration of London, the captor has a right to require the giving up of such goods—

provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel liable to condemnation—

That is, if the observance of the rule requiring that—

captured neutral vessels should be sent to a prize court for adjudication, * * * would involve danger to the ship of war or to the success of the operations in which she is at the time engaged.

The simple wish of the commander not to send such a vessel to a prize court when the vessel is innocent and when the cargo has become contraband without the knowledge of the master of the vessel would not be sufficient ground for requiring the giving up of the goods or for proceeding to the destruction of the goods.

The simple fact of remoteness from the prize court may make it inconvenient, expensive, or inexpedient to send the British vessel in, but such grounds are not sufficient to justify the use of force against a neutral vessel.

In such circumstances, if the master prefers the delay and the adjudication of the prize court to the delivery of the goods to the commander of the cruiser, he is free to make such a decision and to decline to deliver the goods. The commander of the cruiser would, under such conditions, be obliged to decide whether to send in or to release the neutral vessel.

SOLUTION.

In absence of exceptional necessity, and if the contraband is not voluntarily delivered, the commander of the cruiser should either send to a prize court or else release the neutral vessel.

SITUATION V.

PROPORTION OF CONTRABAND.

(It is granted in this situation that the Declaration of London is binding.)

X and Y are at war and a neutral vessel bound to an unblockaded port of Y is stopped on the high seas by a cruiser of State X.

The cargo consists of hay, canned meats, and flour, respectively, one-eighth, two-eighths, and five-eighths of the cargo in value, and the cargo is consigned to a well-known commission merchant in the port of destination, which is not a fortified place, a military or a naval base, although there are several such bases at a distance of from 200 to 500 miles, all connected by rail.

Considering the provisions of the Declaration of London and the explanations thereof given in the General Report to the Conference, what action should the cruiser of X State take? Would a prize court probably condemn any or all of the cargo?

Would the vessel herself probably be a good prize?

SOLUTION.

If there were no treaty provisions to the contrary or regulations in contravention, and unless he is reasonably convinced of the enemy destination of the cargo, the captain of the cruiser of State X should allow the neutral vessel to proceed.

The prize court would probably not condemn the cargo.

The neutral vessel would probably not be good prize.

NOTES.

Review of attitude up to 1908.—It is evident from treaties, conventions, regulations, and opinions that there has been great diversity in the attitude toward penalizing a vessel for the carriage of contraband. The early practice has been gradually modified till the vessel if not involved beyond the simple act of carriage has generally been subject only to the loss and delay consequent upon the adjudication of the prize. Of course, false papers,

resistance to visit and search, participation of the owner or captain in the venture otherwise than as carriers, involves penalities for the vessel. There could not be said to be any absolutely uniform rule in international law upon the subject of penalty for the carriage of contraband. As Prof. Oppenheim said in 1906:

> For beyond the rule that absolute contraband can be confiscated there is no unanimity regarding the fate of the vessel and the innocent part of the cargo. Great Britain and the United States of America confiscate the vessel when the owner of the contraband is also the owner of the vessel; they also confiscate such part of the innocent cargo as belongs to the owner of the contraband goods; they, lastly, confiscate the vessel, although her owner is not the owner of the contraband, provided he knew of the fact that his vessel was carrying contraband, or provided the vessel sailed with false or simulated papers for the purpose of carrying contraband. Some States allow such vessel carrying contraband as is not herself liable to confiscation to proceed with her voyage on delivery of her contraband goods to the seizing cruiser, but Great Britain and other States insist upon the vessel being brought before a prize court in every case. (2 Oppenheim, International Law, p. 443.)

The further divergence in practice and opinion is shown in the attitude of the powers which took part in the International Naval Conference of 1908–9 at London.

Early practice and opinion as to nature of penalty.— In early times it was the practice to confiscate the ship carrying contraband. The theory was that the goods became of service to the enemy only by the transportation to the enemy. It was held that the vessel transporting contraband should therefore be as justly liable to confiscation as the contraband itself. Bynkershoek maintained that penalty for carriage of contraband should attach to the vessel as well as to the goods. (Quaestiones Juris Publici, Lib. I, cap. 2.) Heineceius also maintains that vessel and contraband fall under the same law. Earlier writers who mention the subject at all in general are of the same opinion. Grotius does not make any special mention of the penalty to which the vessel would be liable because she had carried contraband. There seem to have been variations in practice in the late middle ages, but there was no recognition of neutral rights as such.

A British proclamation of 1625, aimed against the King of Spain, after enumerating articles considered contraband, says:

And therefore if any person whatsoever, after three months from the publication of theis presentes, shall, by anie of his Majesties owne shippes, or the shippes of anie his subjects authorized to that effect, be taken sayling towards the places aforesaid, having on board anie of the things aforesaid, *or returning thence in the same voyage*, having vented or disposed of the said prohibited goods, his Majestie will hould both the shipps and goods soe taken for lawful prize, and cause them to be ordered as duely forfeited, whereby as his Majestie doth putt in practice noe innovation, since the same course hath been held, and the same penalties have been heretofore inflicted by other States and Princes, upon the like occasions, and avowed and maintayned by publique wrytings and apologies, so nowe his Majestie is in a manner inforced thereunto, by proclamations set forth by the King of Spaine and the Archduchesse, in which the same and greater severity is professed against those that shall carry or have carried without limitation the like commodities into theis his Majesties domynions. (Robinson, Collectanea Maritima, p. 66.)

The French ordinance of 1584 embodied the principles of ordinances as early as the year 1400. The provision making a neutral ship good prize for carriage of enemy goods seems to have been introduced about 1543. This was set forth in the ordinance of 1584 as article 69. The ordinance of 1681 strengthened this rule.

The treaty of Utrecht, 1713, between Great Britain and France makes definite provision in contravention of the principle of confiscation:

ART. XXVI. But if one party, on the exhibiting the abovesaid certificates, mentioning the particulars of the things on board, should discover any goods of that kind which are declared contraband or prohibited, by the nineteenth article of this treaty, designed for a port subject to the enemy of the other, it shall be unlawful to break up the hatches of that ship wherein the same shall happen to be found, whether she belong to the subjects of Great Britain or of France, to open the chests, packs, or casks therein, or to remove even the smallest parcel of the goods, unless the lading be brought on shore in the presence of the officers of the court of admiralty and an inventory thereof made; but there shall be no allowance to sell, exchange, or alienate the same in any manner, unless after that due and lawful process shall

have been had against such prohibited goods, and the judges of the admiralty, respectively, shall, by a sentence pronounced, have confiscated the same; saving always, as well the ship itself, as the other goods found therein, which by this treaty are to be esteemed free; neither may they be detained on pretense of their being, as it were, infected by the prohibited goods, much less shall they be confiscated as lawful prize; but if not the whole cargo, but only part thereof shall consist of prohibited or contraband goods, and the commander of the ship shall be ready and willing to deliver them to the captor who has discovered them, in such case the captor, having received those goods, shall forthwith discharge the ship, and not hinder her by any means freely to prosecute the voyage on which she was bound.

The practice and opinion of the eighteenth century was not uniform. Treaties also show the variation as during the seventeenth century. Article XXVI of the treaty of Utrecht mentioned above became in effect Article XIII of the treaty of 1778 between the United States and France. Article XIII of the treaty of 1800 between the same powers, after enumerating articles contraband of war, said:

All the above articles, whenever they are destined to the port of an enemy, are hereby declared to be contraband and just objects of confiscation; but the vessel in which they are laden, and the residue of the cargo, shall be considered free and not in any manner infected by the prohibited goods, whether belonging to the same or a different owner.

Pillet, reviewing the attitude toward the carriage of contraband, says:

La sanction de l'interdiction du commerce de la contrebande de guerre est dans la confiscation des marchandises de contrebande, confiscation qui doit être régulièrement prononcée par le tribunal des prises compétent. Cette confiscation doit-elle s'étendre même aux marchandises qui n'ont pas le caratère de contrebande, lorsqu'elles sont comprises dans le même chargement?

L'ordonnance française de 1778 admettait que la cargaison entière ainsi que le navire peuvent être confisqués lorsque la contrebande y figure pour les trois quarts de l'ensemble. Ailleurs, cette proportion est abaissée à la moitié. La jurisprudence la plus sévère, celle de l'Angleterre, admet d'autres cas encore dans lesquels la marchandise innocente devra partager le sort de la marchandise illicite. Il est fort à souhaiter que cette nouvelle application de la doctrine de l'infection hostile disparaisse complètement. Étendue à la totalité de la cargaison, la confiscation

revêt le caractère d'une peine, et cesse d'être ce qu'elle est en réalité, un moyen de défense employé par le belligérant contre un trafic particulièrement funeste à ses intérêts.

Le navire transporteur sera-t-il lui-même confisqué? Il règne sur ce point dans la doctrine la plus grande indécision, mais il paraît raisonnable d'étendre la confiscation au navire lorsque le transport de la contrebande a lieu à la connaissance de l'armateur ou du patron. Bien que cette mesure paraisse dépasser la limite stricte de la défense, elle est indispensable. Seule, elle permet de donner une sanction à la prohibition du commerce de la contrebande, lorsque le vaisseau n'appartient pas au même propriétaire que la marchandise. Sans prétendre donner à la confiscation du vaisseau un caratère pénal, on aperçoit aisément qu'elle est le seul moyen d'action du belligérant sur les armateurs neutres qui se livrent à ce genre de trafic.

On a quelquefois proposé de remplacer le droit de confiscation par un droit de préemption d'après lequel le belligérant saisissant serait simplement autorisé à acheter à leur prix courant dans le lieu de destination les objets de contrebande trouvés à bord des navires neutres. La préemption par elle-même paraît avoir été la première sanction en vigueur, et on cite une ordonnance française de 1543 qui est en effet dans ce sens. Elle fournissait un moyen de tempérer les rigueurs du droit dans les circonstances les plus favorables, par exemple, en cas de contrebande simplement relative. Mais l'usage maritime est généralement contraire à cet adoucissement et on peut craindre en effet qu'il ne soit une sanction bien insuffisante de la prohibition qu'il importe de maintenir. Le droit de préemption ne devra donc être appliqué que s'il est adopté par un traité commun aux deux belligérants et aux neutres intéressés, et aussi peut-être dans une hypothèse particulière que nous rencontrerons un peu plus loin.

En vertu d'une règle générale qui se justifie d'elle-même, les marchandises de contrebande échappent à la confiscation s'il apparaît qu'elles n'ont été mises à bord du vaisseau que pour le service même de sa navigation. (Les lois actuelles de la guerre, p. 325.)

French instructions, 1870.—The Instructions Complémentaires issued by France during the Franco-Prussian War in 1870 make mention of the proportion of contraband.

9. *Cas où le chargement rend le navire neutre saisissable.*—Est passible de capture tout navire qui transporte des troupes, des dépêches officielles ou de la contrebande de guerre pour le compte ou la destination de l'ennemi. Toutefois, si la contrebande de guerre ne se trouve à bord que dans une proportion inférieure aux trois-quarts de la cargaison, vous pouvez, suivant les circon-

stances, soit retenir le navire lui-même, soit le relâcher, si le capitaine consent à vous remettre tous les objets de contrebande dont il est porteur. (Art. 6 des instructions générales du 25 juillet 1870.)

Ne sont pas réputées contrebande de guerre les armes et les munitions, en quantité telle que le permet la coutume, exclusivement destinées à la défense du bâtiment, à moins qu'il n'en ait été fait usage pour résister à la visite.

This rule was less severe than that of 1778, which prescribed that—

1. Fait défense S. M. à tous armateurs d'arrêter et de conduire dans les ports du royaume les navires des puissances neutres, quand même ils sortiraient des ports ennemis, ou qu'ils y seraient destinés; à l'exception toutefois de ceux qui porteraient des secours à des places bloquées, investies ou assiégées. À l'égard des navires des États neutres qui seraient chargés de marchandises de contrebande destinées à l'ennemi, ils pourront être arrêtés et lesdites marchandises seront saisies et confisquées; mais les bâtiments et le surplus de leur cargaison seront relâchés, à moins que lesdites marchandises de contrebande ne composent les trois-quarts de la valeur du chargement; auquel cas les navires et la cargaison seront confisqués en entier. Se réservant, au surplus, S. M. de révoquer la liberté portée au présent article, si les puissances ennemies n'accordent pas la réciproque dans le délai de six mois à compter de la publication du présent règlement.

English prize cases.—The English prize cases have often been cited as authority and as showing the development of the law in regard to contraband carriage because Great Britain has had such a large carrying trade.

The case of the *Ringende Jacob* of 1798 shows the attitude of the English court at the end of the eighteenth century. The first and second of the three points raised in this case bear upon the carriage of contraband. After speaking of the contention as to the ownership and character of the property, Lord Stowell says:

Three other grounds, however, have been taken on which it is contended that the vessel is liable to condemnation: First, on account of the use and occupation in which she was employed; secondly, on account of the contraband nature of the cargo; and thirdly, for violating a blockade.

On the former point reference has been made to an ancient treaty (Oct. 21, 1666) between England and Sweden, which forbids the subjects of either power "to sell or lend their ships for

the use and advantage of the enemies of the other," and as this prohibition is connected in the same article with the subject of contraband, it is argued that the carrying of contraband articles in the present cargo is such a lending as comes within the meaning of the treaty; but I can not agree to that interpretation. To let a ship on freight to go to the ports of the enemy can not be termed lending but in a very loose sense, and I apprehend the true meaning to have been that they should not give up the use and management of their ships directly to the enemy, or put them under his absolute power and direction. It is, besides, observable that there is no penalty annexed to this prohibition. I can not think such a service as this is will make the vessel subject to confiscation.

But it is said there is a contraband cargo. That there are some contraband articles can not be denied. Hemp, the produce of Russia, exported by a Danish merchant, would be confiscable even under the relaxation which allows neutrals to export that article only where it is of the growth of their own country; but to a Dane hemp is expressly enumerated among the articles of contraband in the Danish treaty (July 4, 1780); and to say that a Dane might traffic in foreign hemp, whilst he is forbidden to export his own, would be to put a construction on that treaty perfectly nugatory. The hemp must certainly be condemned; but I do not know that under the present practice of the law of nations a contraband cargo can affect the ship.

By the ancient law of Europe such a consequence would have ensued; nor can it be said that such a penalty was unjust or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted; and the carrying of contraband articles is attended only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. (1 C. Robinson, Admiralty Reports, p. 89.)

In the case of the *Jonge Tobais* in the following year Lord Stowell set forth the accepted doctrine of the liability of the vessel when vessel and contraband cargo belonged to the same person:

Formerly, according to the old practice, this cargo would have carried with it the condemnation of the ship, but in later times this practice has been relaxed and an alteration has been introduced which allows the ship to go free, but subject to the forfeiture of freight on the part of the neutral owner. This applies

only to cases where the owners of the ship and cargo are different persons. Where the owner of the cargo has any interest in the ship the whole of his property will be involved in the same sentence of condemnation; for where a man is concerned in an illegal transaction the whole of his property embarked in that transaction is liable to confiscation. (Ibid., p. 329.)

Lord Stowell regards the old rule of condemnation of the vessel for carriage of contraband as having a logical basis but as relaxed in modern practice. In 1801, in the case of the *Neutralitet*, he says:

The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it can not be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose can not be innocent. The policy of modern times has, however, introduced a relaxation on this point, and the general rule now is that the vessel does not become confiscable for that act. (3 ibid., p. 294.)

American decisions.—The United States courts have, in general, followed the doctrine of the British courts in regard to the carriage of contraband:

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy subjects them, if captured *in delicto*, to the penalty of confiscation, but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual cooperation on their part in a meditated fraud upon the belligerents—by covering up the voyage under false papers and with a false destination. This is the general doctrine when the capture is made *in transitu*, while the contraband goods are yet on board. (Carrington *v.* The Merchants Insurance Co., 1834, 8 Peters Supreme Court Reports, p. 495.)

Treaty provisions.—Article XVII of the treaty of 1794 (expired by limitation in 1807) between the United States and Great Britain limited the penalty for carriage of contraband to the delay consequent upon prize procedure:

It is agreed that in all cases where vessels shall be captured or detained on just suspicion of having on board enemy's property, or of carrying to the enemy any of the articles which are contra-

band of war, the said vessels shall be brought to the nearest or most convenient port; and if any property of an enemy should be found on board such vessel, that part only which belongs to the enemy shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment. And it is agreed that all proper measures shall be taken to prevent delay in deciding the cases of ships or cargoes so brought in for adjudication, and in the payment or recovery of any indemnification adjudged or agreed to be paid to the masters or owners of such ships. (Treaties and Conventions, 1776–1909, vol. 1, p. 601.)

The United States has a number of treaties containing the clause similar to article 18 of the treaty with Brazil of 1828:

The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper. No vessel of either of the two nations shall be detained on the high seas, on account of having on board articles of contraband, whenever the master, captain, or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they can not be received on board the capturing ship without great inconvenience; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and safe port, for trial and judgment, according such ships. (Treaties and Conventions, 1776–1909, vol. 1, p. 601.) to law. (Ibid., p. 139.)

(See also article 19 of the treaty with Bolivia of 1858; article 19 of treaty with Colombia of 1846.)

Special regulations.—In the nineteenth century there were differences, as in early days, in practice in regard to what would make a vessel liable to condemnation for carriage of contraband. Municipal laws and regulations were not uniform. The French rule that if three-fourths of the cargo is contraband the vessel is contaminated does not seem to have gained recognition. A Prussian law of June, 1864, declares a vessel ladened entirely with contraband is good prize. An Austrian decree of the same year is to similar effect. The Russian regulation published in 1900 provided that—

11. Merchant vessels of neutral nationality are subject to confiscation as prizes in the following cases: (1) When the vessels

are caught conveying to the enemy or to an enemy's port; (*a*) ammunition, as well as objects and accessories for making explosions, independently of their quantity; (*b*) other objects contraband of war, in quantities exceeding, by volume or weight, half of the entire cargo.

Propositions as to proportion of contraband at International Naval Conference.—The proportion of contraband was made a ground for condemnation in some of the preliminary memoranda submitted in preparation for the International Naval Conference. The propositions show a considerable variation.

Germany:

Le navire transportant la contrebande de guerre est sujet à confiscation—

1. Si le propriétaire ou celui qui affrété le navire en totalité ou le capitaine ont connu ou dû connaître le présence de la contrebande à bord et que cette contrebande forme, par sa valeur, par son poids ou par son volume, plus d'un quart de la cargaison. (International Naval Conference, British Parliamentary Papers, Miscellaneous, No. 5, 1909, p. 70.)

Spain:

Entre le système qui autorise la confiscation du navire transportant n'importe quelle quantité de contrebande, et le système qui ne consent une telle mesure que s'il y a eu résistance ou fraude, on pourrait établir cette formule de transaction: si le capitaine ou l'armateur ont connu ou pu connaître la présence de la contrebande à bord, le navire sera responsible au capteur d'une rançon ou compensation équivalente à trois fois la valeur de la contrebande et au quintuple du montant du fret. Si la rançon n'était pas payée, le capteur ne pourra dans aucun cas procéder à des mesures d'exécution que contre le navire et tant que celui-ci restera entre ses mains. (Ibid., p. 71.)

France:

La marchandise neutre de contrebande trouvée à bord d'un navire ennemi est confisquée. Les navires neutres chargés de marchandises de contrebande déstinées à l'ennemi sont arrêtés; les dites marchandises sont saisies et confisquées. Les bâtiments et le surplus de leur cargaison sont relâchés, à moins que les marchandises de contrebande ne composent les trois quarts de la valeur du chargement, au quel cas les navires et la cargaison sont confisqués en entier. (Ibid., p. 71.)

Japan:

Les navires ayant de la contrebande de guerre, ainsi que le chargement se trouvant à bord et appartenant au propriétaire du navire, sont sujets à la confiscation dans les cas suivants:

(*a*) Lorsque des moyens frauduleux sont employés dans le transport des marchandises de contrebande;

(*b*) Lorsque le transport des marchandises de contrebande est l'objet principal du voyage. (Ibid., p. 72.)

Netherlands:

La contrebande est sujette à confiscation.

Le navire transportant la contrebande n'est sujet à confiscation que:

1. Si une partie importante de la cargaison constitue de la contrebande, à moins qu'il n'apparaisse que le capitaine, resp. le fréteur, n'a pu connaître le vrai caractère de la cargaison. (Ibid., p. 72.)

Russia:

ART. 6. Les navires de commerce de nationalité neutre sont sujets à confiscation lorsqu'ils transportent:

(*a*) De la contrebande de guerre formant, par son volume, son poids ou sa valeur, plus d'un quart de toute la cargaison;

(*b*) Des objets de contrebande même en moindre quantité, si leur présence à bord du navire, de par leur nature même, ne pouvait évidemment ne pas être connue au capitaine.

ART. 7. Le navire transportant de la contrebande du guerre en quantité moindre d'un quart de la cargaison est passible d'une amende représentant la quintuple valeur de sa cargaison de contrebande. (Ibid., p. 72.)

The preliminary consideration of these propositions led to the following observations:

L'idée commune moderne est de considérer la confiscation comme une sanction et non comme un bénéfice ou une gratification pour le capteur.

En ce qui concerne soit le navire transportant de la contrebande, soit les marchandises autres que la contrebande, se trouvant à bord du même navire, la confiscation apparaît comme subordonnée soit à l'importance plus ou moins grande de la contrebande par rapport à l'expédition, soit à une complicité réelle ou présumée, sans que l'une ou l'autre de ces considéerations soit à elle seule unanimement consacrée.

The basis of discussion was accordingly formulated in somewhat general terms:

La confiscation du navire transportant de la contrebande ou des marchandises autres que la contrebande se trouvant à bord du

même navire est subordonnée à l'importance plus ou moins grande de la contrebande par rapport à l'expédition ou à une complicité réelle ou présumée. Lorsque la complicité est retenue comme cause de confiscation les circonstances frauduleuses la font présumer. (Ibid., p. 73.)

Later in the discussion in the Conference the Netherlands delegate proposed to suppress the words, "ou des marchandises autres que la contrebande se trouvant à bord du même navire," as being contrary to the principles of the Declaration of Paris of 1856.

Discussion on proportion of contraband at International Naval Conference.—The suggestion of the Netherlands delegate that there might be conflict with the Declaration of Paris of 1856 led to considerable discussion. In the fourth session of the full Conference on December 11, 1908, Mr. Crowe, of the British delegation, said:

Par la rédaction adoptée pour l'article 9 des bases de discussion, on a eu en vue de concilier les différents systèmes en vigueur. Selon l'un de ces systèmes, si la contrebande à bord d'un navire dépasse les trois quarts du chargement, le navire et le reste du chargement, aussi bien que la contrebande elle-même, sont passibles de la confiscation. Selon un autre, la seule partie du chargement à condamner est la marchandise de contrebande elle-même et, selon un troisième, la contrebande et le chargement innocent appartenant au propriétaire de la contrebande peuvent être condamnés.

La question de savoir jusqu'à quel point les Puissances Signataires de la Déclaration de Paris et celles qui lui ont donné leur adhésion ont aujourd'hui le droit de confisquer des chargements autres que la marchandise de contrebande, mérite un examen attentif et ma Délégation n'aurait pas d'objections à ce que cette question fût prise en considération sérieuse par la Conférence.

Il est évident que la rédaction actuelle de cet article est excessivement vague, et il serait à désirer que la question fût réglée d'une manière plus précise par voie conventionnelle.

Ma Délégation trouve de la difficulté à se rallier à l'amendement de la Délégation des Pays-Bas, mais elle est prête à l'examiner dans un esprit de conciliation. (Ibid., p. 154.)

Baron Nolde, of the Russian delegation, spoke at some length, suggesting certain amendments:

Les règles du droit moderne en matière de pénalités pour le transport de contrebande ne sont pas identiques dans différents pays. Deux idées générales paraissent se dégager de l'étude de

ces règles: (1) les articles mêmes de contrebande sont confisqués, et (2) la peine doit être plus sévère quant il s'agit de transports qualifiés comme plus nuisibles, et moins sévère quand il s'agit de transports moins dangereux. Sans vouloir discuter pour la moment quels sont les cas où il y a transport dangereux donnant lieu à une peine supplémentaire, je constate que, dans tous les systèmes, on cherche à proportionner l'acte à réprimer et la mesure répressive. Telle est l'idée maîtresse qui paraît être acquise.

Or, cette idée fondamentale ne peut pas être réalisée avec justice si l'on se tient sur le terrain du système préconisé dans plusieurs législations modernes. Celles-ci ne connaissent que cette alternative: la confiscation du navire ou sa libération, c'est-à-dire tout ou rien. Il nous a paru que l'on pourrait trouver un moyen de procéder avec plus d'équité. Pour les cas moins graves de transports illicites, on pourrait s'abstenir de confisquer le navire, tout en punissant ces actes par une amende. L'idée d'une telle amende n'est pas tout à fait nouvelle. Jusqu'à la seconde moitié du XIX^e^ siècle, l'on admettait que la confiscation du navire peut être remplacée par une rançon fournie par le capitaine. La rançon est admise, par exemple, pour ne pas citer les dispositions anciennes, dans les instructions françaises de 1870 (article 17) et dans le Manuel de Holland (1888), quoique à titre exceptionnel. Ce système nous paraît contenir une idée saine et conforme à la logique du droit existant. Pour rendre la peine équivalente au délit—but que l'on cherche à atteindre dans le droit moderne—il faut pouvoir la graduer. Ce n'est possible que si l'on fait revivre sous une forme nouvelle l'idée ancienne de rançon. C'est dans cet esprit que le Gouvernement russe a formulé les propositions contenues dans les articles 7 et 8 de son mémorandum (p. 56). Il a été heureux de constater qu'il s'est rencontré sur ce point avec le Gouvernement espagnol.

En conséquence, la Délégation russe a l'honneur de déposer l'amendement suivant, qui reproduit avec quelques modifications de forme les dispositions du mémorandum russe relatives à l'article 9 (Annexe 37):

Remplacer l'article 9 du projet par les dispositions suivantes:

ART. 9. Les navires de commerce de nationalité neutre sont sujets à confiscation lorsqu'ils transportent:

(*a*) de la contrebande de guerre formant, par son volume, son poids, ou sa valeur, plus d'un quart de toute la cargaison;

(*b*) des objets de contrebande, même en moindre quantité, si leur présence à bord du navire, de par leur nature même, ne pouvait évidemment ne pas être connue du capitaine.

ART. 9 BIS. En dehors des cas prévus à l'article 9, le navire transportant de la contrebande est passible d'une amende représentant la quintuple valuer de sa cargaison de contrebande. (Ibid., p. 155.)

The British delegation later proposed the following as a substitute for the various suggestions before the commission:

La confiscation du navire transportant de la contrebande est permise si le propriétaire, ou celui qui a affrété le navire entièrement, ou le capitaine, a connu, ou a dû connaître, la présence de la contrebande à bord, et que cette contrebande forme plus de la moitié de la cargaison. (Ibid., p. 252.)

The question as to whether the liability for the carriage of conditional contraband should be the same as the liability for the carriage of absolute contraband was raised, and by some it was thought that from the nature of the articles included in these two categories there should be a distinction in treatment. As the report says:

M. le Vice Amiral Roëll demande à la Délégation de Grande-Bretagne quelques explications au sujet de cet article, pour mieux se rendre compte s'il répond entièrement aux idées de son Gouvernement. Cet article ne parle que d'une catégorie de contrebande, et il lui semble que le transport de contrebande conditionnelle ne saurait être jugé de la même façon, quant à la responsabilité du capitaine, que celui de la contrebande absolue. Il se pourrait très bien qu'un capitaine transportât une cargaison de riz, par exemple, destinée à un fournisseur ordinaire de l'ennemi sans toutefois connaître le vrai caractère de cette destination. Dans un cas pareil la pénalité de la confiscation du navire serait excessive. Si, au contraire, cette pénelité était subordonnée à la connaissance du vrai caractère de la destination, la Délégation des Pays-Bas aurait moins de difficulté à accepter l'article. Le comité d'examen devrait, cependant, en amender la rédaction en vue de rendre son intention plus claire.

To this a member of the British delegation replied:

M. Crowe dit que la dernière interprétation donnée à l'article par la Délégation des Pays-Bas est celle qui est conforme à l'idée qui a inspiré sa rédaction. Il s'agit d'établir si le capitaine du navire a connaissance du caractère de contrebande, absolue ou conditionnelle, de la cargaison. (Ibid., p. 201.)

Interpretation of "more than half the cargo."—Questions at once arose as to how the words "more than half the cargo" were to be interpreted. Many suggestions were made. It was evident that many thought that the bulk of the cargo should be the standard, but it was shown that this standard would make possible many evasions of the real end sought by the formulation of such a rule.

There was considered at The Hague in 1907 also this question of the amount of contraband which when on board a vessel with the knowledge of the owner or captain would involve penalty to the vessel. The British proposition in 1908 was similar in this respect to the German proposition of 1907. The German proposition was as follows:

La contrebande de guerre est sujette à confiscation. Il en est de même du bâtiment qui la porte, si le propriétaire ou le capitaine du bâtiment a eu connaissance de la présence de la contrebande à bord et que cette contrebande forme plus de la moitié de la cargaison. (3 Deuxième Conférence Internationale de la Paix, p. 1157.)

The French proposition at The Hague in 1907 was general in its terms:

La contrebande absolue est sujette à confiscation.

Elle peut donner lieu à la confiscation du navire sur lequel elle est trouvée, si le capitaine a résisté à la saisie ou s'il est établi que le capitaine ou l'armateur ont connu ou pu connaître la nature du chargement prohibé. (Ibid., p. 1158.)

France had a rule in the eighteenth century which made the vessel liable when the amount of contraband on board amounted to three-fourths of the cargo. The German delegate expressed a willingness to accept the ratio of one-third or one-quarter, although the original German proposition had been one-half. The Russian delegate pointed out that a small portion of the cargo might have much greater value than a much larger bulk. The French delegation proposed to determine the liability of the vessel according to the "freight value" of the cargo indicated on the vessel's manifests. (Ibid., p. 1120.)

The Hague Conference of 1907 was not able to reach an agreement upon the subject of contraband, and the whole subject was again taken up at the International Naval Conference in 1908–9.

Proportion and destination.—At the International Naval Conference the French delegation, after speaking of the difficulties in determining the destination of contraband, says:

La proportion de la contrebande relativement à l'entier chargement apparaît, au contraire, comme une base juste et sûre de la

confiscation. Ici on prend en considération, comme le dit avec raison, selon nous, le Mémorandum japonais, l'importance de la contrebande par rapport à l'expédition. L'assistance donnée à l'ennemi en violation de la neutralité est-elle le principal objet de l'expédition? Cette assistance a-t-elle une importance suffisante pour que le navire lui-même, grâce auquel cette assistance est donnée, soit confisqué? Sous cette forme, on conçoit très bien que la question soit posée et que la solution dépende de la réponse que justifieront les faits.

Reste à savoir comment apprécier cette importance, cette proportion.

Le texte, sur lequel la Commission délibère, dit simplement "que cette contrebande forme plus que la moitié de la cargaison." C'est peut-être insuffisamment précis. Est-ce la moitié en poids; en volume; en valeur? Doit-on tenir compte ensemble ou séparément de ces divers éléments d'appréciation? Doit-on les distinguer selon les marchandises? Bien que certains Mémorandums les aient adoptés, il est permis de penser que pratiquement ce sens d'une vérification parfois délicate, le plus souvent assez longue, lorsque dans un chargement considérable et varié la contrebande est de quelque importance. Va-t-on juger, en quelque sorte, *à l'estime?*—ce serait bien arbitraire. Peut-on procéder par des experts?—que de lenteurs, de frais et de complication.

À la Conférence de La Haye, la Délégation française avait proposé de consacrer comme critérium un élément facile à constater et qui précisément est ordinairement basé lui-même sur la valeur, le poids, le volume ou l'encombrement de la marchandise: c'est le fret. Non seulement le fret, toujours mentionné sur le connaissement, permet indirectement de juger si telle ou telle marchandise est plus ou moins importante par sa valeur, son poids ou son encombrement, mais encore il représente aussi exactement que possible l'intérêt que le navire a dans le transport de la marchandise, et, souvent plus élevé s'il s'agit de contrebande, il sert à en révéler le caractère.

Notre Délégation prie la Commission de vouloir bien apprécier si ces considérations sont exactes et si, dans ces conditions, le système le plus pratique et le plus sûr, pour frapper le navire transporteur de contrebande, n'est pas (1) de s'attacher simplement à l'importance de la contrebande par rapport à l'entier chargement; (2) de fixer cette proportion au moyen du fret.

Quant au quantum de la proportion, bien que la *moitié* soit un peu différente de la pratique française traditionnelle, le désir d'une entente et le souci d'une réglementation commune nous conduiraient à ne pas nous opposer à son adoption. (International Naval Conference, British Parliamentary Papers, Miscellaneous, No. 5, 1909, p. 288.)

It is evident that a single standard might be evaded with comparative ease. Suppose that the restriction should be that a vessel would be confiscated only when more than one-half its cargo by value was contraband. It might be possible to take as part of the cargo a single diamond which in weight or volume would constitute only an infinitesimal part of the cargo—would the vessel be exempt though the remainder of her cargo might be contraband? It would be manifestly easy to shift the freight rates so that the evidence might be misleading. It was therefore thought best to introduce in the Declaration of London several tests for determining the liability of the vessel.

Provision of the Declaration of London, 1909.—The final form was embodied in article 40 of the Declaration of London.

ARTICLE 40.—*A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.*

The General Report interprets this article as follows:

It was universally admitted, however, that in certain cases the condemnation of the contraband does not suffice, and that condemnation should extend to the vessel herself, but opinions differed as to the determination of these cases. It was decided to fix upon a certain proportion between the contraband and the total cargo.

But the question divides itself: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which ranged from a quarter to three quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also encourages practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods sufficiently bulky, or weighty in order that the volume or weight of the contraband may be less. A similar remark may be made as regards the value or the freight. The consequence is that it suffices, in order to justify condemnation, that the contraband should form more than half the cargo according

to any one of the points of view mentioned. This may seem severe; but, on the one hand, proceeding in any other manner would make fraudulent calculations easy, and, on the other, it may be said that the condemnation of the vessel is justified when the carriage of contraband formed an important part of her venture, which is true in each of the cases specified. (International Law Topics, Naval War College, 1909, pp. 89, 91.)

Nature of the cargo.—In the situation under consideration the cargo consists of hay, canned meats, and flour. By Article 24 of the Declaration of London—

The following articles and materials, susceptible of use in war as well as for purposes of peace, are, without notice, regarded as contraband of war, under the name of conditional contraband:

(1) Food.

(2) Forage and grain suitable for feeding animals.

The entire cargo would, if destined for warlike use, be of the nature of conditional contraband.

Destination of cargo.—In accordance with Article 33 of the Declaration of London—

Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a Government department of the enemy State, unless in this latter case the circumstances show that the articles can not in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under article 24 (4). (International Law Topics, 1909, p. 79.)

Article 34 and the General Report bearing upon it attempts to define enemy destination.

ARTICLE 34.—*The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities or to a merchant, established in the enemy country, who, as a matter of common knowledge supplies articles and material of the kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place of the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband. In cases where the above presumptions do not arise, the destination is presumed to be innocent. The presumptions set up by this article may be rebutted.*

Ordinarly contraband articles will not be directly addressed to the military or to the administrative authorities of the enemy State. The true destination will be more or less concealed. It

is for the captor to prove it in order to justify the capture. But it has been thought reasonable to set up presumptions based on the nature of the person to whom the articles are destined, or on the nature of the place for which the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy Government with articles of the kind in question. It may be a fortified place of the enemy or a place serving as a base, whether of operations or of supply, for the armed forces of the enemy.

This general presumption may not be applied to the merchant vessel herself which is bound for a fortified place, except on condition that her destination for the use of the armed forces or for the authorities of the enemy State is directly proved, though she may in herself be conditional contraband.

In the absence of the preceding presumptions, the destination is presumed to be innocent. This is the ordinary law, according to which the captor must prove the illicit character of the goods which he claims to capture.

Finally, all the presumptions thus established in the interest of the captor or against him admit proof to the contrary. The national tribunals, in the first place, and, in the second, the International Court, will exercise their judgment.

British view.—Mr. Norman Bentwich, summing up the British view of the effect of these articles relating to the condemnation, says:

According to existing English prize law, the ship carrying contraband is subject to condemnation if she has made forcible resistance to the captor, if she carries false or simulated papers, or if there are other circumstances amounting to fraud, or if she belongs to the owner of the contraband cargo. In other cases the ship is restored after condemnation of the cargo, but no compensation is paid for the loss of freight or time caused by the detention. (Cf. *The Ringende Jacob*, 1 C. Rob., 92.) Other countries, however, have condemned the vessel when the proportion between the noxious and innocent part of the cargo exceeded a certain fraction; in some cases when it was more than half, in others when more than two-thirds, in others, again, when more than three-fourths. The Declaration has established a uniform rule in place of this diversity of practice, according to which the vessel may be condemned whenever the contraband, reckoned either by value, or by weight, or by volume, or by freight, forms more than half the cargo. Further, when the vessel can not be condemned because the contraband is less than half the cargo by any of these measures, but there are circumstances which incriminate her in the carriage, and suggest knowledge by the master of

the nature of her cargo, the shipowner may be condemned to pay the costs of the captor incurred in making and adjudicating upon his prize. The same penalty would presumably be imposed also when the vessel carried fictitious or fraudulent papers. Following the existing practice, innocent goods which belong to the owner of the contraband on board the same vessel may be condemned; but innocent goods belonging to another shipper, even if he be an enemy subject, must be released, though no compensation again is paid to their owner for detention and loss of market. On the whole, the deterrent powers of belligerents against contraband trade have been increased by the Declaration, but not unreasonably, since the gains for carriage of contraband being notoriously large it is fair to visit knowledge of the noxious character of the cargo on the shipowner, when the contraband forms more than half of the goods on board. (The Declaration of London, p. 80.)

Résumé.—It may happen that there may be treaty specifications existing between States that make a case fall under the first clause of Article 7 of the Convention relative to the Creation of an International Prize Court. This clause provides:

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.

The Declaration of London might be of no effect if the States at war, X and Y, should have a treaty containing a clause like that in Article XIII of the treaty of 1799 between the United States and Prussia:

But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

As the cargo consists of hay, canned meats, and flour, articles which may be of use to the general population of State Y, the actual destination to the use of the enemy forces must be shown. The consignee is a well-known commission merchant in a place that is not fortified and not defended. The presumption, unless it is well known that he furnishes the Government of Y, is therefore that

the cargo is innocent. From the statement of Situation V it can not be inferred that the commission merchant regularly furnishes the Government. If there are other ports from which supplies would more naturally be obtained, the presumption would be that these supplies were innocent. The presumption of innocence would therefore be favorable to the release of the vessel. The general rule for the naval officer would be that in case of doubt a vessel should be sent to a prize court for adjudication.

The doubt, with only such data as given as proposed in Situation V, is too great to warrant destruction of the neutral vessel under the provisions of the Declaration of London.

Under the provisions of the Declaration of London, which are presumed to be binding in this situation as proposed, it is evident that the cargo is of the nature of conditional contraband only if having a hostile destination, and hence the vessel carrying this cargo, if the cargo is bound for warlike use, should be sent to a prize court. The consignment to a commission merchant, even though established in an unfortified place, whose location is such as to make transportation to military bases easy, might be sufficient to justify the commander in sending the vessel to a prize court. The presumption would be that the cargo was innocent. It would be for the captor to prove the contrary.

From the discussions upon articles 33 and 34 at the International Naval Conference, it is evident that the prize court would probably condemn the entire cargo as contraband of war under the provision of article 39, which states, "contraband is liable to condemnation," if the destination of any part was hostile or if the commission merchant were an enemy contractor.

Contrary to the practice of many States in late years, and also in contravention of certain existing treaties, Article 40 provides:

> **A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.**